EQUAL ACCESS TO JUSTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON AGENCY ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

THE EQUAL ACCESS TO JUSTICE ACT

DECEMBER 9, 1982

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EQUAL ACCESS TO JUSTICE

THURSDAY, DECEMBER 9, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON AGENCY ADMINISTRATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:04 a.m., in room 2228, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Staff present: John Maxwell, chief counsel and staff director; Ally Milder, counsel; and Susan Shirk, chief clerk.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. The hour of 10 arriving, and Senator Domenici not being able to come at this time, I think we will start down the agenda with the witnesses who are to appear after Senator Domenici.

Before that, I have an opening statement that I wish to make regarding the purpose of this hearing. Today our purpose is oversight of the Equal Access to Justice Act.

We will be asking the following questions: Is the act being properly implemented; is the act effective, and if not, why not?

As I am sure many of you are aware, the act contains a sunset provision of October 1984. It is my hope that during today's hearing, we can uncover any problems associated with the year-old act and find solutions to those problems. This will allow us to propose necessary amendments early next year as the Senate looks toward reauthorization of the act in the 98th Congress.

This concept first appeared as legislation in the 95th Congress, when Senator Pete Domenici introduced a bill similar to the act before us today. The bill was finally enacted into law in 1980, with an effective date of October 1981.

The bill was designed with two purposes in mind:

First, with an eye toward forcing Government agencies to be responsible for their conduct. Adopting the rule that a Government entity must be held accountable for attorneys' fees where the Government could not show that its actions were substantially justified would provide an incentive for agencies to thoroughly examine actions contemplated against private citizens. Rather than holding the losing agency automatically liable for attorneys' fees and therefore perhaps discouraging valid agency actions, allowing the agency to prove it acted with justification, seemed the appropriate course to follow.

Second, the act was aimed at enabling those of modest means access to the judicial process. Hence, the title of the legislation—Equal Access to Justice Act.

In order to allow small businesses and private individuals, those who were being injured most through arbitrary Government action and regulation, to pursue litigation against the Government, the sections relating to limitation of income and corporation size were included in the bill. These sections allowed the little guy to fight city hall and to actually come out ahead if he prevailed instead of facing bankruptcy due to the high cost of litigation.

Through the testimony of our distinguished witnesses today, we will find out if the act is indeed accomplishing these designed purposes.

At this point, I would like to indicate for the record that I was in the past, as evidenced by my position on H.R. 5612 in the 96th Congress, am presently, and will continue to be a strong supporter of this act. If it is not accomplishing its intended goals, I anticipate that changes will be made. The regulatory noose has been around the country's neck for too long. Extension of this act will allow us to breathe a little easier.

Of course, we might really obtain some air if the House would act on S. 1080, the regulatory reform bill, and H.R. 1776, the legislative veto bill, prior to the end of this Congress. So I am taking this opportunity to send that message to the leadership of the other body, hoping that they will respond positively. Regulation costs each American family of four $2,290 annually. Serious changes have to take place now if we want the burden to ease.

With that, I would like to call our first witness, Mr. Paul McGrath. He will be offering the views of the Department of Justice on the Equal Access to Justice Act.

Mr. McGrath serves as the Assistant Attorney General in charge of the Civil Division, which represents the United States in general civil litigation.

I want to thank you, Mr. McGrath, and your counsel, for coming to testify on this very important issue. And before you start to testify, and before you introduce your associate, I would like to make a general announcement for all. I would like to suggest that we, as much as we can, adhere to the 5- to 7-minute time schedule that has been asked of all of you. The extent to which you need to summarize to accomplish that, we would appreciate it, but I do not want anybody detracting from the main points that they want to make. Also most of you can anticipate that I will have some questions that I want to ask of you, as well.

As is our practice, entire statements will be printed in the record. Please proceed, Mr. McGrath.

STATEMENT OF HON. PAUL McGRATH, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY SUSAN J. HERDINA, COUNSEL

Mr. MCGRATH. Thank you very much, Senator.

I would like to introduce Susan J. Herdina, who is here with me this morning. She is counselor to me, as Assistant Attorney Gener-

al, and also, she has been helping to coordinate attorneys' fee matters among the litigating divisions of the Department of Justice.

I am very pleased to be here this morning, to appear on behalf of the Department of Justice in connection with this hearing on the Equal Access to Justice Act. As you indicated, Mr. Chairman, I understand that my prepared testimony will be made part of the record, and so I would briefly like to summarize some of the principal points in that testimony and underline some of the items that we believe are particularly important.

First, and most important, I would like to say that the administration continues to strongly support the Equal Access to Justice Act, and in particular its main goal, which is to protect small business and individual citizens from having to foot bills for legal services to redress unjustified actions by the Government.

There are two principal points dealt with in the prepared testimony. First, there are some comments on how this legislation has fared in the courts, in its first year of existence, and second, the testimony makes some suggestions for possible modifications to the existing legislation.

As far as the first year—actually, it is about 14 months—of history under this act, I think it is fair to say it is a little bit too early to tell what effect this legislation will have. There have been about 60 court decisions under the Equal Access to Justice Act during the first 14 months, at least 60 decisions that we are aware of, of which 21 were awards to plaintiffs and 39 were denials of awards.

The courts have not been wholly consistent in construing the act and making decisions on some of the principal provisions of the act. The one that has concerned us the most is how the courts are going to construe the phrase, "substantially justified" in the act. Our position has been that, basically, attorneys' fees are appropriate where an agency has taken a position that is without any justification at all, where the position was not arguable. Most of the courts have agreed with that kind of interpretation.

Our concern has been that if the courts simply decide that whenever an agency, after the fact, is found to be wrong, that attorneys' fees would be required, that that may inhibit imaginative and affirmative action by agencies, but to date, that concern does not seem to have been borne out by the decisions.

The suggestions that we make for modifying the Equal Access to Justice Act, I think, can fairly be characterized as, for the most part, technical suggestions. In the first year of court decisions under this act, we have found that there are some ambiguities that have appeared after the test of litigation, and since, however, those suggested modifications, by and large, would be regarded as technical ones, I think it is not necessary to summarize them at this time. Suffice it to say, I am ready to answer any questions that the chairman has, either on the testimony or on other aspects of the Equal Access to Justice Act.

Senator GRASSLEY. Would the Department of Justice support or oppose an amendment to the act requiring that fees would only be awarded to those prevailing parties who suffered a pecuniary loss at over $500?

Mr. MCGRATH. That is not a particular thing that we have considered up to this point, Senator. The philosophy of the act has

been that wherever someone has suffered a loss because of unjustified conduct and has had to incur legal bills to redress that grievance, that those legal bills should be paid.

However, I think if you get to deprivations of money that become de minimus, you do raise a question of whether cases of that size really ought to burden the courts. That is something we have not considered, though, but would be happy to consider.

Senator GRASSLEY. If you were going to consider such an amendment, and let's assume that maybe you would have support for it, would you see it difficult to counter the claim that it is difficult to put a price tag on many items in litigation—as in instances of injunction or declaratory judgments.

Mr. MCGRATH. Well, yes. If, in addition to some amount of money less than $500, there is a significant injunctive relief sought, or something other that you cannot put a monetary price tag on but is important, I think that raises quite different considerations. Many of the cases in which attorneys' fees have been awarded have involved injunctive relief against the action of the agency found to be unreasonable, and obviously, the injunctive relief has a value—perhaps not a monetary value in all cases, but certainly, a value to the claimant, be it a small business or a private individual. So that would change the situation if there was injunctive relief of some importance.

Senator GRASSLEY. We have the case of *Donovan* v. *Ramsey* and *Tyler Business Services* v. *NLRB,* in which it seemed to me like unreasonable conduct was an example that would be heard if such limitations were put on.

Mr. MCGRATH. Well, those particular cases, particularly the *Tyler Business Services* case, of course, is still pending. That, I believe, was the decision by the fourth circuit, recently. We are still considering what to do about that particular case and what further review might be sought, and I would hesitate to comment on that particular case because of that reason, Senator. But obviously, in general, if there is action by an agency that is unjustified within the meaning of this act. is unreasonable and outrageous, then the attorneys' fees, the reasonably incurred attorneys' fees of the small business or the private individual, ought to be paid under the act.

Senator GRASSLEY. Yes; you know, there have been suggestions to have language similar to this—"fees not be disproportionate to the amount in controversy." I suppose your previous comments would apply to it, as well. But I think we get into a similar dilemma if we start looking at language like that, as well.

Mr. MCGRATH. I think it is a similar dilemma. That kind of question has been raised under attorneys' fees statutes in the past. One of the most famous incidents was the *Copeland* case here in the Court of Appeals for the District of Columbia, where there was an award of attorneys' fees substantially in excess of the amount that was awarded for damages, and that does raise a substantial question, where we are only talking about a monetary award, whether there ought to be attorneys' fees substantially in excess of the recovery. It is a question whether the courts really ought to be used when we are talking about monetary recovery, where the amount being spent on litigation is vastly out of proportion to what is being recovered. Certainly, if a private party is suing another private

party, one of the things that the private party would take into account is what is the cost of litigation, is it really worth it; or, put another way, should the courts really be burdened where the amount to be recovered is way out of proportion with what it would cost to recover.

Senator GRASSLEY. Would you address the problem of different court interpretations of the term, "substantially justified," particularly as it applies to the Government's litigation posture, rather than its underlying policy position, and then also regarding the *Alspach* decision, whether or not this undermines one of the purposes of the act, which is to penalize unreasonable Government action.

Mr. MCGRATH. As I indicated before, I think the question of how the courts interpret the phrase, "substantially justified," is the most critical question under the Equal Access to Justice Act. To this point, the courts have generally interpreted that language in a manner that we would regard as sensible. That is, they have held that an agency's action is substantially justified within the meaning of the Equal Access to Justice Act, where the agency had some rational basis for taking the position, where the position was arguable, or where there was a real arguable controversy.

In particular, some decisions that I would point to as stating the test in a way that I think we would support are the *Tyler Business Services* case in the fourth circuit that you referred to, Mr. Chairman; a case in the District Court for the Northern District of Illinois, called *United States* v. *Miscellaneous Pornographic Magazines*, a decision by Judge Schader—and there have been several others.

I think the importance to the question is really this. Under this act, we do want to make agencies accountable where their actions are unjustified, and hopefully, provide an incentive for agencies to act in a justifiable fashion. But if we go too far, we may deliver a message to agencies that they should always take the safest course out of whatever problem they have, and they should always therefore just open up the Federal coffers to whoever is claiming money, and that is particularly troublesome. The reason that incentive would be there for the agencies if this phrase is construed too loosely is that generally, under section (d) of the act, there has been no appropriation to the judgment fund specifically labeled equal access to justice. Any awards under subsection (d) have to be paid out of agency appropriations. So that it is of particular concern how that phrase, "substantially justified," is construed.

Senator GRASSLEY. In summary, is there a need for legislative clarification of the term?

Mr. MCGRATH. I do not believe so, Senator, because I think that so far, the courts are working out what this phrase means in real life situations; at least in our view, they do not seem to be straying from what we understand to be the purpose of the act, as stated rather clearly in the legislative history. So at least at this point, we do not see a need for some amending legislation to clarify the meaning of that phrase.

Senator GRASSLEY. Do you agree that the *Alspach* decision was a correct decision?

[Mr. McGrath confers with counsel.]

Senator GRASSLEY. That refers to the litigation position rather than the agency's underlying reason for acting.

Mr. MCGRATH. Senator, if I could, I wish I could supply an answer to that question for the record.

[Subsequent to the hearing, Mr. McGrath supplied the following information:]

Having reviewed the *Alspach* decision, I conclude that it is consistent with the intent of the Act. As I indicated in my testimony, the courts have generally interpreted the phrase "substantially justified" to refer to the government's position in the litigation, not the actions on which the suit is based. This construction of the phrase is supported by both the distinction that the Act draws between proceedings at the agency level and proceedings on judicial review, and the legislative history.

I would be happy to respond to any further questions you or other members of the Committee may have regarding the Act.

Senator GRASSLEY. Yes; that is fine.

Is there any need for legislative clarification in the jurisdictional areas of the act, for instance, the 30-day pay period?

Mr. MCGRATH. There is one suggestion we have on that. The act, we believe, is a little bit ambiguous now, as to whether that 30 days starts from the final judgment, or whether it starts from the date when the time to appeal expires.

It is a fairly significant question, because we believe that the 30-day period is jurisdictional and cannot be waived by the parties. Some certainty on that is significant, and that is why we did suggest some legislative amendment to deal with that ambiguity. We have run into a problem in that in several cases.

And I must say, it is really the plaintiff who runs into the problem because the plaintiff has to know when to file its petition.

Senator GRASSLEY. Has your Department reviewed and come to any conclusions on the effects of the administration's new proposals to cut attorneys' fees on the Equal Access to Justice Act?

Mr. MCGRATH. Well, I believe, Senator, that there is no current proposal being considered which would cut attorneys' fees under the equal access to justice provision, section (d). That the only thing being considered that I am aware of is a provision which would cap attorneys' fees under the specific statutory provisions which provide for attorneys' fees.

Senator GRASSLEY. You are right on that point.

Mr. MCGRATH. And that would have the indirect effect, of course, under section (b), of providing a cap there. We are still looking at the possibility of proposing legislation to provide for a fee cap under specific attorneys' fees provisions, and it is anticipated that there may be legislation introduced on that early next year, but a final decision on that has not yet been made.

Senator GRASSLEY. Do you have any comment or reason that stems from the fact that some fees have been made, but the General Accounting Office has not certified many of the claims, and what we can do to remedy that situation?

Mr. MCGRATH. I believe that the situation is moving along a little bit more smoothly. Some of the problems that we have had have risen out of another ambiguity in the act. There have been some interim fee awards, and unfortunately, that has raised this problem. If there is a fee award to be paid out of the judgment fund, that has to be certified by GAO. Normally, under their statutory provisions, they would only certify the payment of a judgment, if it is a final judgment that is no longer subject to appeal. If you

have an interim award that is really separate, and the court orders it paid, the Justice Department cannot certify to GAO that it is a final judgment which will not be appealed if we intend to appeal it later on, and if we cannot appeal it right then, we are in sort of a never-never land.

We got into a horrible situation in a case in Los Angeles where we could not make an acceptable certification to GAO. GAO therefore would not certify it for payment, but we had a court order requiring the Justice Department to pay the interim fee, and the court indicated it was going to hold the Attorney General in contempt if it was not paid. Fortunately, GAO was convinced this was an exceptional situation, but we are concerned about that catch-22 problem with the statute as it is now written. We think if that were amended, it would solve not only a legal problem, but possible embarrassment.

Senator GRASSLEY. Are U.S. attorneys allowed to include attorneys' fees within the scope of their negotiations for settlement?

Mr. MCGRATH. Yes, very definitely. There has been some issue raised as to whether it is appropriate to negotiate settlement of the merits at the same time as settlement of the amount of attorneys' fees are being discussed. It is our position that it is appropriate to combine those negotiations. There was a decision by the Supreme Court about 1½ years ago, in the *White* case, which indicated that it is generally appropriate to combine the subject of settlement on the merits, and settlement of attorneys' fees, so long, obviously, as the plaintiff's lawyer is careful about his or her ethical strengths, and in particular, it would be inappropriate to have any kind of understanding among counsel that the negotiations would not be disclosed to the plaintiff.

But subject to that kind of problem, we think it is appropriate to combine the negotiations, and in many instances, it is very difficult to negotiate a settlement unless you can deal with the whole package.

Senator GRASSLEY. If there is a group of plaintiffs sharing counsel, is it your understanding that each of the plaintiffs must meet the income standards, and if so, are all the fees to be paid, or only a portion?

Mr. MCGRATH. I think that is one that has just come up that we are really still looking into. The act itself does not specifically cover it, but it apparently has come up recently, and we are still looking at that question.

Senator GRASSLEY. You have also indicated that you are concerned about the awards of fees incurred prior to the effective date of the act. Can you tell me on what basis the court awarded these fees, and would you suggest a legislative modification to allow fees only for work incurred after the effective date of the act?

Mr. MCGRATH. Well, the basis for awarding the fees—although some of the courts that have decided this have used different reasoning—but the basic theory is that the act says that it applies to cases pending on, I believe, October 1, 1981, and the courts that have awarded fees for services rendered before that date have basically said that the case was pending as of that date, and, therefore, fees for periods prior to that date could be awarded.

At least one case, the *Allen* case in the Northern District of Illinois, decided by Judge Decker, did agree with our position, which is basically that this is a waiver of sovereign immunity, and unless the statute specifically says that it applies to periods prior to its effective date, that under such cases as the *Brookfield* case in the court of claims, that it should not be construed as a waiver of sovereign immunity for the period prior to that date.

There is right now a split among the courts on this question, and we are not at this time proposing legislation. We believe that this would be an appropriate subject for the courts to work out.

Senator GRASSLEY. I have no further questions, but let me suggest to you that since other members are not here, you might receive some in writing. Let me also say that the record will remain open for those who wish to submit additional information, for our consideration, for an additional 7 days.

Thank you, Mr. McGrath.

Mr. MCGRATH. Thank you very much, Senator.

[The prepared statement and additional submissions of Mr. McGrath follow:]

PREPARED STATEMENT OF J. PAUL MCGRATH

Mr. Chairman and members of the Subcommittee:

I am pleased to appear before the Subcommittee on Agency Administration to discuss the implementation of the Equal Access to Justice Act (Title II, Pub. L. 96-481).

A. Implementation of the Act

You have asked the Department of Justice to provide you with a short summary of the Department's position on this legislation. You also have indicated that the discussion today will focus on the effectiveness of the Act and potential modifications.

Perhaps the best place to begin is the materials that I have brought with me today relating to the implementation of the Act. I believe the most important of these are the guidelines that a Departmental task force prepared, analyzing the substantive issues presented by the Act and setting forth several policy decisions. The Departmental task force was composed of representatives of all the litigating divisions, as well as representatives from the relevant offices and bureaus. The guide is intended to assist lawyers in both the Department and the various United States Attorneys' Offices in quickly responding to attorneys' fee applications. The guide covers such issues as: (1) retroactive application of the Act; (2) prevailing parties; and (3) the meaning of the term "substantial justification." The guide is not meant to be an exhaustive legal treatise of the Act, and we know that court decisions will ultimately interpret the meaning of the Act's various provisions. I will submit, for the convenience of the Subcommittee, a copy of the guide, entitled, Award of Attorney Fees and Other Expenses in Judicial Proceedings Under The Equal Access to Justice Act. In addition, the Justice Department has

prepared a Digest of Court Cases under the Equal Access to Justice Act, current as of August, 1982, which I would be happy to provide to the Subcommittee. I also have a list of subsequent decisions that I will submit to the Subcommittee.

B. Effectiveness of the Act

As I am sure this Subcommittee is aware, the passage of the Act arose from a perception that the cost of litigation deters some persons or businesses from challenging unreasonable governmental actions (H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5). Further, the awarding of attorneys' fees and other expenses against the United States in certain administrative and judicial actions not previously authorized was intended to promote agency accountability.

Although this Act has now been operative for over one year -- since October, 1981 -- and fee petitions are being filed almost routinely when a case is decided on its merits -- only a small number of cases have been decided by the district courts, and even fewer have been decided by the courts of appeal. In light of the fact that these cases are moving slowly through the courts, I believe it is somewhat premature to reach a conclusion as to the effectiveness of the Act.

I would like to note, however, that we are disturbed by several court decisions. We are particularly concerned about those decisions which have rejected the Department of Justice position on the meaning of "pending" (e.g. Tyler Business Services, Inc. v. N.L.R.B., No. 81-1847, slip op. (4th Cir. Nov. 24, 1982); Photo Data v. Sawyer, 533 F. Supp. 384 (D.D.C. 1982); Constantino v. United States, 536 F. Supp. 60 (E.D. Pa. 1982). Contra: Allen v. United States, No. 79C 3812 (N.D. Ill. July 6, 1982)).

It is our position that, while the Act applies to all pending cases, any fees awarded under the Act must be limited to those incurred after October 1, 1981, the effective date of the Act. To do otherwise would be to provide a windfall for attorneys in thousands of cases then pending before the courts. Such retroactive liability against the government in cases which may have been in the court system for several years could result in a large liability for the government - a major budgetary drain - without serving the purpose for which the statute was enacted. The purpose is to provide financial assistance to those litigants who, without such assistance, would be unable to sue. Awarding retroactive attorney fees would not further this goal. Moreover, the other primary purpose of the Act -- to "[curb] excessive regulations and the unreasonable exercise of government authority" (S. Rep. No. 96-253, supra, at 7; H.R. Rep. No. 96-1418, supra, at 12) -- is surely not facilitated by awards of pre-Act fees which are based upon actions that the agencies had no opportunity to modify based upon the standards of the new Act.

We are particularly disturbed by the award in Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern Calif., C.V. 78-4715 R (C.D. Calif. February 11, 1982). There, the court awarded $432,285 in attorney's fees against the Department of Justice, the Federal Communications Commission, the Department of Health and Human Services, and the Department of Education. Four-fifths of this award is for legal activities generated prior to October 1, 1981. If this award is upheld on appeal, it will obviously require a substantial budgetary outlay by one or more of the agencies involved. (The fee petition is currently stayed, pending an appellate decision on the merits of the case).

C. Recommended Modifications

You have specifically asked for our recommendations concerning modifications to the Act. It is probably too early to project all the issues that we will encounter under the Act; however, there are several issues that we have already encountered which we believe warrant your immediate attention.

When I testified before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice last March, I suggested three modifications to the Act. Those modifications are significant ones, in my estimation, and, therefore, I would like to reiterate them today.

1. Agency Review of Fee Awards Made By Adjudicative Officers

There appears to be uncertainty as to whether an agency may review an adjudicative officer's determination on the award of fees and other expenses under the Act. Both the legislative history and the language of the Act are silent on the procedures an agency must follow after an adjudicative officer makes a decision. The Administrative Conference of the United States has promulgated model regulations for the Act which provide for agency review of the adjudicative officer's decision. However, others may read language in the Act to mean that the adjudicative officer's decision is final and that there can be no agency review. 1/ Because the Act allows only the party suing the government to appeal an adjudicative officer's fee determination, this latter reading of the Act would mean that an agency

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1/ "An agency that conducts an adversary adjudication shall award [fees and expenses] . . . unless the adjudicative officer of the agency finds that the position of the agency was substantially justified ...." 5 U.S.C. §504(a)(1)(emphasis added).

"The decision of the adjudicative officer of the agency ... shall be made part of the record containing the final decision of the agency .... 5 U.S.C. §504(a)(3)(emphasis added).

would always be bound by an adjudicative officer's determination with regard to awards. We suggest that the Act be clarified either by providing that an agency may review an adjudicative officer's fee award determination, or by providing that the agency, too, may seek judicial review of the fee award determination.

(2) Definition of Party

We would also suggest that the Act be amended to conform the definition of the term "party" in 28 U.S.C. 2412(d)(2)(B) to the definition in 5 U.S.C. 504(b)(1)(B). These two provisions, which were intended to be identical, set the standards for the eligibility of individuals and small businesses to receive fee awards under sections 504 and 2412(d). Section 504(b)(1)(B) defines an eligible business as one that employs no more than 500 employees, if its net worth is less than $5 million. This is in conflict with the definition found in 2412(d)(2)(B), which can be read to say that any business with less than 500 employees, even if its net worth is more than $5 million, is eligible for a fee award. Because the Act's legislative history indicates that Congress meant for the two definitions to be the same, See H. Rep. No. 96-1418 at 18, S. Rep. 96-253 at 21, and because section 504(b)(1)(B) appears to reflect congressional intent more closely than section 2412(d)(2)(B), we would suggest that section 2412(d)(2)(B) be amended to conform to section 504(b)(1)(B).

(3) Meaning of the Term "Final Judgment"

The Act provides that:

> A party seeking an award of fees and other expenses shall, within thirty days of final

> judgment in the action, submit to the court an application for fees and other expenses.

28 U.S.C. 2412(d)(1)(B). It is unclear whether a "final judgment" occurs when the court enters an appealable order or when a party's right to appeal that order lapses. We favor the former interpretation. In order to resolve this question, we believe that a precise definition of the term "final judgment" should be included in the statute. This is important since the thirty-day deadline for filing the application is jurisdictional and cannot be waived. Wallis v. United States, (Ct. Cl. No. 453-79C).

(4) Interim Fee Awards

Recently a serious question has developed concerning interim fee awards made pursuant to §2412. The legislative history underlying the Act suggests, of course, that in appropriate situations, interim fees could be awarded under that section. Pursuant to §2412(c)(2), any judgments entered under §2412(b) shall be paid "as provided in sections 2414 and 2517 of this title . . . ." If this reference to §2414 was intended only to identify the source of the payment of such judgments (the judgment fund), then presumably the United States would be liable for the payment of interim fees to the same extent as any other party. If, however, the provisions of §2414 must be satisfied before payment can be made, then, pursuant to §2414 a judgment for interim fees can be paid only when all appellate action with respect to it is completed or when the right to seek further review no longer exists.

This problem was seen in a recent case, Paralyzed Veterans v. Smith, C.A. No. 79-1979 (C.D. Cal.), where the district court awarded interim attorney fees against the United States. The government immediately appealed that order but the Ninth Circuit

dismissed the appeal on the grounds that the interim fee order was not appealable. GAO, at that juncture, interpreted §2414 as prohibiting immediate payment because the merits of the fee award had not been reviewed on appeal and the government intended to seek such review when appropriate. GAO altered its position and payment was finally made after the court indicated that it would find the Attorney General in contempt of court if prompt payment was not made by the government.

In order to avoid the government's having to pay interim fees before the award of such fees can be appealed, consideration should be given either to prohibiting the award of such fees against the government altogether or to specifically authorizing appeals from interim fee awards.

(5) Challenges to Constitutionality of Statutes

In at least two cases being handled by the Department of Justice, fees are being sought as a result of court holdings that certain statutes were unconstitutional. Since agencies ordinarily have no option but to implement the laws enacted by Congress and since the Department of Justice similarly must ordinarily defend the constitutionality of all statutes, it appears inconsistent with the purpose of the Act to subject the government to a possible award of fees in such cases. An EAJA exception for cases in this category should be considered.

(6) Unreasonably High Fee Requests

In a significant number of cases, applicants for fees and expenses have sought fee awards which our attorneys believe were unreasonably high and, in some instances, grossly excessive. The submission of such applications obviously prolongs the resolution of fee disputes, on occasion necessitates discovery and, further,

makes potential fee settlement more difficult. One suggestion is to insert a provision which would require a court to deny all fees if it finds the initial amount sought to be unreasonably high or, perhaps, for the sake of symmetry, substantially unjustified. Indeed, courts have already recognized that the denial of all fees is an appropriate remedy for overreaching. See, e.g., Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980). The insertion of such a provision into the Act might well have the salutary effect of encouraging fee applicants to be more reasonable in the amounts they seek.

(7) Definition of Expenses

In the course of litigating fee petitions, several questions have arisen with respect to the term "expenses" as used in 28 U.S.C. §2412(d). Under that section, a court may award "fees and other expenses," in addition to costs, incurred by the party. It is unclear whether the definition of "fees and other expenses" appearing at 28 U.S.C. §2412(d)(2)(A) is meant to be all-inclusive or merely representative. If the definition is not all-inclusive, what other expenses are allowable? The Department of Justice is being confronted with attorney petitions which seek to recover for such items as attorney and witness transportation costs, hotels, secretarial overtime, and computer research -- expenses which traditionally are not recoverable.

As a last comment, I would like to express the Administration's support for the purpose of the Act. In general, persons -- particularly members of the small business community -- who are harmed by agency action which is not substantially justified should be eligible for fee awards. We should be careful, however, that the worthwhile purposes of the Act are not undercut by inappropriate awards. Thank you for the opportunity to appear before the Subcommittee this morning.

U.S. Department of Justice
Washington, D.C. 20530

Digest of Court Cases Under The Equal Access to Justice Act Pub. L. No. 96-481

The Department of Justice Task Force on the Equal Access to Justice Act has received court decisions, reported and unreported, dealing with applications made for attorney fees under the Act. For the ready reference of Department of Justice attorneys and other agency counsel who must respond to fee applications under the Act, a digest of these court opinions has been prepared. It should be noted that this digest only includes those opinions which have been forwarded to the Task Force. There may be other court decisions not included which should be considered when doing comprehensive research under the Act.

Digest of Court Cases Under The Equal Access to Justice Act Pub. L. No. 96-481

Prepared by:
Office of Legal Policy
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21. Kennedy v. United States, 49 A.F.T.R. 2d 82-590.

22. Kinne v. Schweiker, No. 80-81 (D. Vt. June 30, 1982).

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29. Muth v. Secretary of Army, 525 F. Supp. 604 (D.D.C. 1981).

30. National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. (1982).

31. Ngou v. Schweiker, No. 82-0865 (D.D.C. July 7, 1982).

32 Nichols v. Schweiker, No. C81-818R (W.D. Wash. Apr. 8, 1982).

33. Ocasio v. Schweiker, 81 Civ. 4098 (S.D.N.Y. June 15, 1982).

34. Papson v. United States, 49 A.F.T.R. 2d 148,520 (Apr. 28, 1982), aff'd June 22, 1982).

35. Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. Feb. 22, 1982).

36. S. & H. Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 672 F.2d 426 (former 5th Cir. 1982).

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44. United States v. Citizens State Bank, 668 F.2d 444 (8th Cir. Jan. 15, 1982).

45. United States v. Pomp, No. 81-266 (M.D. Fla. 1982).

46. United States v. Prescott, No. CIV-80-29-BU (D. Mont. May 17, 1982).

47. Wallis v. United States, No. 453-79C (Ct. Cl. Nov. 25, 1981).

48. Wolverton v. Schweiker, No. 78-1223 (D. Idaho Mar. 2, 1982).

CASE SUMMARIES

Fees Denied

1. Allen v. United States, No. 79C3812 (N.D. Ill. July 6, 1982). Discovery during course of litigation showed plaintiffs were not responsible for their failure to pay taxes. When that became known, the government agreed to settle. Plaintiffs argued that the government's position in the litigation was unreasonable because of the long time until the suit was finally dismissed. They claimed that their affidavit established the necessary facts as early as 1978 (settlement was December 3, 1981). The court determined that it would have been unreasonable for the government to abandon its case without some independent corroboration of the factual statements in plaintiffs' affidavit, which was obtained only in the discovery phase of the litigation. Therefore, government's position was substantially justified.

In addition, the court held that fees could not be awarded for pre-Act legal work. In this case, only one half hour of the 75 hours in the litigation was spent after October 1, 1981. The court held that individuals who challenged governmental action before the effective date of the Act were not deterred by the high cost of litigation from protecting their interests against the government.

2. Alspach v. District Director of IRS, 527 F.Supp. 225 (D. Md. 1981). In this case challenging an IRS tax assessment, a claim for $2,850 in attorney fees was rejected by the court on the ground that the government had met its burden of showing substantial justification for initially contesting the action, and that it conceded the case "fairly expeditiously when the facts became known to counsel."

3. American Indians v. United States, Court of Claims, No. 235 Final Order, Rule 148, (April 27, 1982). The Ak Chin Indian Community filed for attorney fees in connection with a claim to recover funds involving a lease of reservation land. The court held that 28 U.S.C. § 2412(d) is not available for use in Indian tribe's claim authorized by and decided pursuant to the provisions of the Indian Claims Commission Act. This Act provides a mechanism to control contracts for attorney fees and expenses made by claimant tribes and for compensation of attorney fees from proceeds of the judgment recovered. The court ruled that the Equal Access to Justice Act under 28 U.S.C. § 2412(d) was not intended to supersede or repeal other statutory provisions that authorized attorney fees and expenses.

4. Aukes v. United States, No. 82-M-43 (D. Colo. Mar. 30, 1982). The court denied prevailing plaintiff's request for fees, holding that while the termination assessment made under 26 U.S.C. § 7429 by the IRS was not reasonable, nevertheless the government's litigating position was substantially justified. Moreover, it would be unjust to award fees in the action "which was in large part occasioned by [plaintiff's] failure to file tax returns."

5. Berman v. United States, 534 F.Supp. 641 (N.D. Ohio Mar. 18, 1982). Plaintiffs sought to recover an overpayment of federal income tax. Judgment for the plaintiffs was entered by stipulation. Court denied application for attorney fees because: (1) plaintiffs did not set forth any information showing that they met the net worth eligibility criteria of § 2412(d)(2)(B); (2) neither the application nor the pleadings contained any evidence from which the court could conclude that the position of the United States was not substantially justified; and (3) the application did not conform to the requirements of Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

6. Bowers v. Moffett, No. 81-2674 (D.D.C. June 15, 1982). One hundred and twenty-one days after a court-approved settlement, plaintiff filed his application for attorney fees pursuant to 28 U.S.C. 2412(d). Defendants moved to dismiss plaintiff's application since it was not submitted within thirty days of the final judgment in the action, as required by the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B). The court determined that "final judgment," lacking any clarifying construction in the Act or legislative history, must be construed in terms of the common usage of the term in other contexts, such as 28 U.S.C. § 1291 Fed. R. App. P4(a), and Fed. R. Civ. P.54. An approved settlement, such as the one in Bowers, resolving all the merits of a plaintiff's claim is a final decision. Thus the court denied fees, holding that it could not "disregard the clear and unequivocal language of the Act which directs that application for award of attorneys fees shall be filed within thirty days of final judgment."

7. Citizens Coalition v. City of Euclid, 537 F. Supp. 422 (N.D. Ohio 1982). In this case, Citizens Coalition for block grant compliance originally sought declaratory and equitable relief, alleging that local and federal agencies had failed to implement a program of affirmative fair housing. Plaintiffs further sought to compel the federal defendants to develop specific and quantifiable regulatory performance standards for affirmative fair housing. The parties subsequently arrived at a settlement. HUD agreed to supply certain information to the coalition, but there was no agreement as to standards.

In denying fees to plaintiffs, the court noted that nothing in the settlement agreement indicated that the plaintiffs had obtained any of the relief that they sought from HUD. Therefore, the court concluded that the plaintiffs were not prevailing parties against HUD. The court discussed the question of substantial justification and whether the test should be the reasonableness of the government's underlying action or, instead, the reasonableness of its litigating position. The court ruled that when there had been no trial on the merits and no admission of fault in the consent decree, it must examine the reasonableness of the litigating position since there would generally be insufficient information to determine the reasonableness of the government's underlying action.

8. Commissioner of Highways v. United States, No. 81-1569 (7th Cir. May 27, 1982). The Commissioners of Highways of various Illinois towns were awarded damages against the United States, and applied for an award

of attorney fees. The district court denied fees; and the Commissioners appealed. The Court of Appeals denied the appeal, stating that on October 1, 1981 the only matter pending was the Commissioners' appeals from the denial of attorney fees by the district court. The court did not find Bradley v. Richmond controlling in this case and held that the statutory requirement of section 208 of the Equal Access to Justice Act was not satisfied. In addition, the court held that since the Commissioners represented political subdivisions of a state, they did not come within the definition of party as defined in 28 U.S.C. § 2412(d)(2)(B).

9. Donovan v. Dillingham, 668 F.2d 1196 (11th Cir. 1982). The court denied the award of attorney fees on appeal of an action brought under Employed Retirement Income Security Act. The court held that the position of the United States was substantially justified because the United States was not certain whether this case, heard in the new eleventh circuit, would be controlled by an action pending in the fifth circuit.

10. Graham v. United States, No. 81-0188 (Bankr. D. Idaho Mar. 11, 1982). Issue was whether the bankruptcy court had jurisdiction and power to award attorneys fees. The government contended that until April 1, 1984 the bankruptcy court was not a "court" within the definition of 28 U.S.C. § 451, and thus incapable of awarding fees under id. § 2412. However, the court held that it did have jurisdiction since under id. § 1471(c) bankruptcy courts are empowered to exercise all jurisdiction conferred on the district courts. Nevertheless, no fees were awarded in this case because all litigation was concluded prior to the effective date of Equal Access to Justice Act.

11. Kalyn Co. v. United States, No. W-79-CA-36 (W.D. Tex. Apr. 10, 1982). The court held that the government was substantially justified, both in law and in fact, in seeking to collect the excise taxes at issue. Even though plaintiff ultimately prevailed, "[g]overnment counsel would have been remiss in its duty to the taxpayers not to test plaintiff's credibility on this issue."

12. Kennedy v. United States, 49 A.F.T.R. 2d 82-590. This action was brought by plaintiff to quiet title to certain real estate. The government sought by counterclaim to set aside as fraudulent certain conveyances in the plaintiff's claim of title. The court ruled that the initial transfer of land was not fraudulent but that the second transfer was. Plaintiff, having prevailed on the issue of the first transfer, applied for attorney fees. The court denied fees, holding that the government had a reasonable basis for attacking the conveyance to the taxpayer, even though it ruled against the government as to the first conveyance. The court's rejection of the government's "badges of fraud" argument did not make the government's position substantially unjustified.

13. Kinne v. Schweiker, No. 80-81 (D. Vt. June 30, 1982). Plaintiff was found by the court to be entitled to disability insurance benefits. He then applied for attorney fees under 28 U.S.C. § 2412(d). The court discussed the legislative history of the Equal Access to Justice Act and noted that the focus of the Act was primarily on those individuals for whom cost may deter vindication of rights. The court also

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pointed out that the statute's net worth ceiling was further evidence that removing economic deterrents to the legal process is the primary purpose of the Act. Here, plaintiff was represented by a legal clinic incurred no out-of-pocket expenses nor faced the prospect of dilution of any past-due benefits by an award under 42 U.S.C. 406. The court, therefore, denied the application for attorney fees, since plaintiff faced no economic deterrent.

14. Martenson v. United States, 82-1 U.S.T.C. P ¶ 55 (D. Minn., Dec. 30, 1981). A claim for fees under the Equal Access to Justice Act was denied in this FOIA case on the ground that Section 206 of the Equal Access to Justice Act precluded such an award. Section 206 provides that § 2412(d) is not intended to modify or replace existing federal authorizations for attorney fees and other expenses against the United States.

15. Matthews v. United States, 526 F. Supp. 993 (M.D. Ga. 1981). In this case, the court held that the Corps of Engineers' authorization of a private dock in a public recreation area was an abuse of discretion. Thereafter, plaintiff asked for $20,829 in attorney fees under both 42 U.S.C. § 1988 and under the Equal Access to Justice Act. After summarily rejecting the civil rights claim, the court proceeded to analyze the Section 2412 claim in depth. The court held that an award of attorney fees against the Corps would not be justified under the facts of the case because the Corps had "substantial justification" for its position. It "did have reasons" for authorizing the private dock and did "in good faith and on clearly reasonable grounds" oppose removal of the dock to another location.

Additionally, the court noted that Section 2412(d) provides that the court may decline to award attorney fees if "special circumstances" make an award unjust. The court found such special circumstances here since the bulk of the court's opinion was prepared prior to October 1, 1981, even though for a number of reasons the court was substantially delayed in entering the decision until after that date. The court concluded that: "Since the United States would not have been liable for plaintiff's attorneys fees had a timely decision been entered, the court believes that it would be unjust to now award plaintiff attorneys fees under amended Section 2412 which did not become effective until this opinion had already, in large part, been drafted by the court, but not yet entered."

16. McQuiston v. Commissioner (78 T.C. 56 May 13, (1982). The Tax Court ruled that it does not have jurisdiction to award costs of attorney fees under either 42 U.S.C. § 1988 or the Equal Access to Justice Act. By virtue of 28 U.S.C. § 451, 28 U.S.C. § 2412 only applies to courts established under article III of the United States Constitution. The tax court is an article I court.

17. Metropolitan National Bank of Farmington v. United States, No. 81-71842 (E.D. Mich. Mar. 16, 1982). Plaintiff's motion for fees under both §§ 2412(b) and (d) was denied on the grounds that special circumstances made an award unjust. The court held that although plaintiff bank complained chiefly about the failure of the IRS to correct a wrongful tax levy, the bank did not give the IRS an adequate opportunity to correct the mistake before it filed suit. The bank failed to provide full information

to the IRS, so that the revenue officers' decision not to release the levy was not unreasonable.

18. Ngou v. Schweiker, No. 82-0865 (D.D.C. July 7, 1982). Suit was brought on behalf of a class of refugees to enjoin the Department of Health and Human Services from terminating cash and medical benefits under the Refugee Act of 1980. Plaintiffs challenged regulations which had been issued without complying with the 30-day advance notice requirement of the Administrative Procedure Act. The court entered a preliminary injunction. Thereafter, it found in favor of the defendant on the substantive challenge to the regulations. The court held that plaintiff was entitled to seek compensation for work on the preliminary injunction phase of the case. However, the court denied the application for attorney fees, holding that the defendant's invocation of the emergency exceptions to the 30-day advance publication requirement was substantially justified.

19. Nichols v. Schweiker, No. C81-818R (W.D. Wash. Apr. 8, 1982). Application for attorney fees pursuant to Equal Access to Justice Act denied by the court which held that the Social Security Act set forth the criterion for award of attorney fees in this type of case and that this was plaintiff's exclusive remedy.

20. Papson v. United States, 49 A.F.T.R. 2d 148,520 Apr. 28, 1982, aff'd June 22, 1982). The government first accepted and then refused to accept so-called "Flower Bonds" in payment of estate tax liabilities. Plaintiff brought suit to compel the Bureau of Public Debt to redeem the bonds. By stipulation the government then accepted the bonds.

Plaintiff estate's request for attorney fees was denied. The litigating position of the government was substantially justified since it was reasonable for the United States to litigate this case until a precedent was obtained. However, the court also held that an estate representing the assets of an individual whose net worth did not exceed $1,000,000 would otherwise be eligible for an award of attorneys fees under 28 U.S.C. 2412(d).

21. S. & H. Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 672 F.2d 426 (former 5th Cir. 1982). The court of appeals held: (1) Equal Access to Justice Act does not apply retroactively to fees for an agency adversary adjudication which was not pending on the Act's effective date although the proceeding was on appeal in court. The court in a footnote pointed out that this holding might not extend to proceedings before a district court (versus proceedings on appeal), and that its conclusion might differ in a non-agency case. (2) The government met its burden of demonstrating that its position was substantially justified by showing that the Occupational Safety and Health Review Commission's new interpretation of a certain regulation cured due process defects perceived in prior Fifth Circuit cases and was a novel but credible extension or interpretation of the law.

Another issue addressed by the court was OSHRC liability for attorney fees if they were awarded against the government. The court held that in this case OSHRC did not file a brief or participate in oral argument, that it possesses only adjudicatory functions and has no substantive rulemaking or policy-

making power and that the review of its decision was prosecuted solely by the Secretary of Labor. Since OSHRC was merely a nominal party not advancing any policy or legal position, its role in this case was similar to that of a district court in relation to a case on appeal, and thus it would be manifestly inappropriate for OSHRC to bear a portion of the expenses of the appeal.

22. Ritchie v. Schweiker, C80-4053 (N.D. Iowa Dec. 18, 1981). The court denied fees under the Equal Access to Justice Act, concluding that the applicability of the Act to Social Security cases is, at best, questionable. The court stated that Congress set up a detailed statutory scheme for attorney fees in SSA cases, with the source of the fees to come from the benefits awarded, not to exceed 25 percent of the total past due benefits to which the claimant is entitled.

23. Twohey v. Sheet Metal Workers' Union, No. CIV. S-81-962 RAR (E.D. Cal. May 21, 1982). Petitioner Twohey, acting regional director of the NLRB, brought an action for injunctive relief pursuant to section 10(1) of the National Labor Relations Act. The court denied petitioner's request and awarded respondent reasonable attorney fees and costs. On a motion by petitioner for reconsideration of the award of attorney fees, the court vacated its order awarding attorney fees, holding that even though the request for injunctive relief had been denied, petitioner had reasonable cause to believe that violations of the Act had occurred, and his request for injunctive relief was not insubstantial or frivolous. Therefore, the government met its burden of demonstrating that it was "substantially justified" in bringing the underlying action.

24. United States v. 101.80 Acres of Land, 92 F.R.D. 774 (D. Idaho 1982). The court denied a landowner's request for attorney fees in a condemnation suit since he was not a "prevailing party" under the Equal Access to Justice Act (see below).

25. United States v. 329.73 Acres of Land, 666 F.2d 281 (5th Cir. 1982). Landowner urged that a condemnation case is a civil action covered by the Equal Access to Justice Act. The court on rehearing held that condemnation cases are governed by 42 U.S.C. § 4654 and that, in past court rulings under Fed. R.Civ.P. 71(A)(1), costs in condemnation cases cannot be taxed to the United States. In addition, 42 U.S.C. § 4654 states the circumstances under which an owner in a condemnation case may recover attorney fees, and landowner here did not meet these criteria. The court ruled that there was no indication in the Equal Access to Justice Act that Congress intended to change the previous rule for condemnation cases and include them under the Equal Access to Justice Act.

26. United States v. Central Penn Nat'l Bank, No. 80-4538 (E.D. Penn. Feb. 5, 1982). The government requested attorney fees under 28 U.S.C. § 2412(b) as prevailing party in an action to enforce subpoenas for income tax records. The court denied fees stating that in light of the gross disparity in resources between the government and the private citizen, such fees should not be awarded in the absence of extraordinary bad faith, or vexatious conduct of the most extreme kind, or litigation that is inexcusably frivolous.

27. United States v. Citizens State Bank, 668 F.2d 444 (8th Cir. Jan. 15, 1982). The court in this summons enforcement case held that appellants were prevailing parties because they had limited the scope of the summons. The court denied the award, however, on the grounds that the United States was substantially justified in bringing the enforcement proceeding involved in the case.

28. United States v. Prescott, No. CIV-80-29-BU (D. Mont. May 17, 1982). Summary judgment unopposed by the government was granted in favor of the defendant. Subsequently, defendant applied for attorney fees. The court denied fees, pointing to its order in the case which expressly stated that the position of the government "does not appear unreasonable." The court ruled that since Congress had characterized the standard for "substantial justification" as one of reasonableness, an award was not appropriate.

29. Wallis v. United States, No. 453-79C (Ct. Cl. Nov. 25, 1981). In this military pay case, plaintiff sought and received a correction of his military records to reflect retirement from the Air Force by reason of a disability. Thereafter, plaintiff filed for a 30-day extension of time for filing his fee petition under the Equal Access to Justice Act. The court denied the request on the ground that the 30-day period is jurisdictional.

CASE SUMMARIES

Fees Awarded

1. Arvin v. United States, No. 81-6476-CIV-JAG (S.D. Fla. Feb. 10, 1982). The court awarded to plaintiff without opinion, $13,380 in attorney fees (approving the $75 per hour rate requested), $402.05 in costs, and $1,647.94 in expenses. In this case, the court rejected the argument that the termination assessment made under 26 U.S.C. § 7429 by the Internal Revenue Service was substantially justified.

2. Berman v. Schweiker, 531 F. Supp. 1149 (N.D. Ill., 1982). The court awarded $2,310.50 in fees against the United States for plaintiff's successful appeal of an SSA decision denying plaintiff's request for revision of his social security earnings record. The court held that: (1) because the government's 60-day period within which it could appeal from the district court decision had not expired on October 1, 1981, the action was "pending" on that date; (2) the Act covers judicial review of SSA proceedings by a district court where the agency takes a position in the case; and (3) the government's position was not substantially justified because it classified plaintiff as a contractual service employee "despite the fact that no such category existed at the time plaintiff rendered the services for which he was compensated."

3. Constantino v. United States, 536 F. Supp. 60 (E.D. Pa. 1982). The court awarded $761.09 in attorney fees and expenses, ruling that attorney fees incurred at the IRS administrative level were recoverable under 28 U.S.C. § 2412(d)(3) and that pre-October 1, 1981, fees were awardable since "that statute is applicable to all cases pending on October 1, 1981."

4. First Fidelity Life Insurance v. SBA, No. H-81-54 (S.D. Tex. May 4, 1982). The Plaintiff brought a successful action under Federal Tort Claims Act. The FTCA limits the fee award to 25 percent of the judgment, which in this case was $15,000. Despite the 25 percent limitation under the FTCA, the court held that § 2412(b) authorized a separate independent award against the United States and awarded $6,000 in attorney fees.

5. Fitzgerald v. Hampton, No. 76-1486 (D.D.C. Mar. 3, 1982). Plaintiff Fitzgerald was severed from his Air Force job in 1970. After appeal of the dismissal to the Civil Service Commission, the Air Force was directed to restore him to his previous position or a position equivalent. In 1973, the Air Force appointed him to a new job, but Fitzgerald appealed to the CSC claiming the new position was a reduction in rank and violated the specific terms of the original the CSC decision. CSC upheld the Air Force and Fitzgerald filed a civil action in 1974. On March 3, 1981, the court determined that the CSC's failure to find that Fitzgerald had actually suffered a reduction in rank was arbitrary and capricious. Thereafter, a petition for attorney fees was filed. Fitzgerald was granted attorney fees for

services rendered throughout the course of the litigation. The court held that as of October 1, 1981, no final judgment had been entered since the court decision of March 1981 contemplated a subsequent ruling on the sufficiency of the proposed job description as well as submission of additional briefs. Thus, the action was pending on October 1, 1981. Accordingly, the court held that it could award attorney fees for services rendered throughout the litigation. Fitzgerald applied for and was found entitled to fees under 28 U.S.C. § 2412(b), citing the common law ground of "bad faith." A negotiated settlement of fees of $200,000.00 has been made.

6. Florida Farmworkers Council, Inc. v. Secretary of Labor, No. 80-2776 (D.C. Cir. Dec. 29, 1981). In an order citing no grounds, the court awarded to Florida Farmworkers Council $12,930 for fees and costs.

7. Globe v. United States, No. 80-1898 (D.D.C. Apr. 7, 1982). Plaintiffs prevailed in enjoining the government from leasing government space for less than the market rate to a competitor. Plaintiffs, in addition, obtained a declaration that such a lease was void ab initio. The court held that though the government claimed that it "had been breaking new ground" for the authority of the Federal Home Loan Bank Board to lease out commercial space, the terms of the leases underlying the litigation were "clearly unreasonable." The court held that plaintiffs were entitled to fees even though the fees were incurred prior to October 1, 1981, since the case was "pending" at that time. The court cited the Photo Data case (see below) as persuasive on the issue of retroactivity.

8. Greater Los Angeles Council on Deafness (GLAD) v. KCET, No. 78-4715R (C.D. Cal. Feb. 11, 1982). In this suit against the Department of Education, HHS, the FCC, and Justice, among others, the district court granted fees of $432,285 for time spent on whether defendants had an obligation under the Rehabilitation Act and the Communications Act to issue regulations providing for equal access to public television for the handicapped, and whether by failing to issue regulations applicable to public broadcasting, the defendants intentionally fostered and promoted discrimination against the deaf and hearing impaired. The opinion focused on the amount to be awarded rather than on the legal basis for the award. The court awarded $175 per hour for the work of plaintiff's attorney, plus a multiplier of two and awarded pre-October 1, 1981 fees.

9. Hoang Ha v. Schweiker, No. C-82-1258 SAW (N.D. Cal. June 23, 1982). Plaintiff was awarded $20,530.29 in attorney fees and expenses. The court found that the federal defendant's position was not substantially justified. One factor the court considered was whether there was a judgment adverse to the government in a prior similar suit. The court pointed to Ngou v. Schweiker, No. C-82-0865, (D.D.C. Mar. 31, 1982) and concluded that the Secretary was obligated to follow the APA notice requirements.

10. Kronheim v. Schweiker, No. 81-325-CIV-JWK (S.D. Fla. June 2, 1982). The court awarded fees of $4,500 and costs of $66 to plaintiff. It held (1) that actions brought under the Social Security Act are covered by the Equal Access to Justice Act; (2) that the Equal Access to Justice Act applied to

pending cases on effective date of the Act and rejected the retroactivity argument; and (3) that the position of the government was not substantially justified since the section at issue was "concededly unconstitutional, yet the relief proposed by the Secretary was highly inadequate." Several of the defendant's arguments were without foundation, the court said, particularly that plaintiff had no standing to seek relief.

11. Ocasio v. Schweiker, No. 81 Civ. 4098 (S.D.N.Y. June 15, 1982). Plaintiff brought an action to review the decision of the Social Security Administration denying her benefits under section 202(e) of the Social Security Act. The government acknowledged that its interpretation of the statute was erroneous and the case was settled pursuant to a stipulation. In response to the plaintiff's motion for fees, the government contended that the Equal Access to Justice Act did not apply because the attorney fees provision of the Social Security Act was the exclusive remedy. The court held that the exclusivity language of section 206 of the Social Security Act applied to fees allowed by the court against the judgment in favor of the client and not to fees to be assessed against the United States pursuant to the Equal Access to Justice Act. The court also held that plaintiffs were entitled to fees incurred prior to October 1, 1981 so long as the matter was pending or commenced after that date. The court awarded fees of $1,231.25.

12. Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. Feb. 22, 1982). Fees of $5,710.50, which were generated between September 30, 1981 and November 16, 1981, were awarded to plaintiff for having successfully appealed a GPO finding that plaintiff was not the "lowest responsible bidder" on a contract to print and distribute the Federal Personnel Manual. The court expressly rejected the government's retroactivity argument that pre-October 1, 1981 expenses are not awarded, finding nothing in the legislative history to support this argument. It further found that the government had acted unreasonably and without substantial justification when GPO rejected plaintiff's low bid on the contract "with no more than a terse three-sentence letter."

13. Spang v. United States, 553 F. Supp. 220 (W.D. Okla. 1982). Taxpayer was awarded attorney fees and costs pursuant to Equal Access to Justice Act. The court held that the actions of the IRS were not substantially justified where the agency never gave the taxpayer specific findings of fact on which the assessment was based and where the penalty assessed was excessive.

14. Underwood v. Pierce, No. 79-1318-HP (C.D. Cal. Mar. 25, 1982). This case involved a $60 million settlement against HUD and in favor of a class of low-income tenants who resided in certain federally subsidized housing projects. Plaintiffs' attorneys requested fees under both the common fund/benefit doctrine and 28 U.S.C. §§ 2412(b), 2412(d). The Court held that there was no reachable common fund for fees since the settlement agreement explicitly provided that no fees would come from the fund. However,

it granted fees under § 2412(d), rejecting the pre-October 1 retroactivity argument and stating that the government had not met its burden of proving that its position was substantially justified since the facts in the case indicated that the litigation was required to make HUD comply with congressional directives.

15. United States v. Pomp, No. 81-266 (M.D. Fla. 1982). The court awarded $5,175.50 in attorney fees to the defendant as a condition of permitting the United States to dismiss the $57,071.79 collection suit which had been based on a tax assessment already abated when the suit was filed. The court held that defendant had prevailed, and the government's lawsuit was not substantially justified. It did, however, refuse to award attorney fees of more than $75 per hour. The court awarded pre-October 1, 1981 fees in this case as well, without discussion.

16. Wolverton v. Schweiker, No. 78-1223 (D. Idaho Mar. 2, 1982). The court found that plaintiff was entitled to social security benefits under Title II of the Social Security Act. The government argued that the Social Security Act should control fee awards, since section 406 of that Act limits attorney fees to 25 percent of the total amount of past-due benefits awarded to his client. However, the court held that section 406 does not preclude an award under the Equal Access to Justice Act, § 2412(d). Other holdings: (1) Pre-October 1, 1981 fees were recoverable. If Congress had intended to limit the meaning of "pending" it could have done so by restricting fee awards to those "incurred" after the Act's effective date. (2) Lack of

substantial evidence on the record requiring reversal of the Secretary's administrative decision would not be sufficient to require a finding that the government's position was "not substantially justified." However, where there is no evidence in the record to support the decision of the agency, this would be sufficient to make a finding by the court that the government was "not substantially justified." (3) Social security proceedings at the administrative level are not covered by the Equal Access to Justice Act since the definition of an adversary proceeding includes only an adjudication under 5 U.S.C. § 554 in which the position of the United States is "represented by counsel or otherwise." The Secretary's social security proceedings do not fit this definition because government does not take a position nor is it represented by counsel or otherwise.

Indeterminate Outcomes

1. Knights of the Ku Klux Klan v. East Baton Rouge Parish School B. No. 79-1780 (former 5th Cir. June 25, 1982). June 25, 1982). The motion for attorney fees was the only matter pending before the court when the Equal Access to Justice Act became effective on October 1, 1981. The Supreme Court remanded the case for reconsideration in light of the Act. The Court of Appeals ruled that because the Klan's right to appeal had not expired or been exhausted, its action was "pending" on the effective date of the Act. The Court of Appeals stated that its basic role was to review a fee award or denial of an award under the Equal Access to Justice Act, and thus remanded to the district court to determine if the Ku Klux Klan qualified under either the mandatory (28 U.S.C. § 2412(d)) or discretionary (28 U.S.C. § 2412(b)) provisions of the Equal Access to Justice Act.

2. Muth v. Secretary of Army, 525 F. Supp. 604 (D.D.C. 1981). In this action under the Age Discrimination in Employment Act against the Secretary of the Army, plaintiff prevailed, in part, at the administrative level and then brought suit in the district court seeking additional relief. The court held that plaintiff would be eligible to apply for legal fees for work performed in connection with this case if he prevailed in the district court, but was precluded from recovering attorney fees for work performed at the administrative level, which was not an "adversary adjudication" within the meaning of the Act.

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Miscellaneous

National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. 1982). While this is not a case brought under the Equal Access to Justice Act, it is an important attorney fees case since the U.S. Court of Appeals for the District of Columbia offered guidance on the calculation of attorney fees under federal statutes. In Copeland v. Marshall, 641 F.2d 880, the court decided that a "lodestar" fee must be established in calculating awards under Title VII of the 1964 Civil Rights Act. The lodestar represents the number of hours reasonably expended multiplied by a reasonable hourly rate. Once established, it may be adjusted to reflect various other factors. In NACV, the court further defined the obligations of fee applicants: (1) To fix the prevailing hourly rate, an applicant must provide specific evidence of the prevailing community rate for the type of work involved. Generalized affidavits from friendly attorneys presenting a wide range of hourly rates will not suffice, the court stated. In addition, applicants must submit specific evidence of actual billing practices during the relevant time period. (2) The fee application must contain sufficiently detailed information about the hours logged and the work done. This requirement can be met by keeping complete, standardized time records and by preparing detailed summaries indicating the work performed by each attorney. This information should voluntarily be made available to the court or opposing counsel. (3) Formal discovery against a fee applicant should not be as searching as discovery on the merits and should be precisely framed.

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1. Bar Bea Truck Leasing Co. v. United States, No. 82-4-00582 (Slip op. 82-80, September 23, 1982). In a case of first impression in the Court of International Trade, fees were denied on the grounds that petitioner had unclean hands which constituted special circumstances that made an award unjust under 28 U.S.C. 2412(d).

2. Grand Boulevard Improvement Assn., et al. v. City of Chicago, et al., No. 80 C 4760 ; Alice B. Coleman, et al. v. HUD, No. 81 C 1284 (N.D. Ill. September 7, 1982). In these two consolidated actions, plaintiffs successfully challenged certain HUD Regulations. Plaintiffs in both cases, represented by the Legal Assistance Foundation of Chicago, sought fees. As to one, Grand Boulevard, the court held that plaintiffs were not entitled to fees because the Government's position was substantially justified. As to the other case, Coleman v. HUD, the court awarded fees in the amount of $28,466. In so finding, the court rejected the government's argument on retroactivity. The court did accept the government's argument that "position" as used in the statute, is the litigation position of the government's attorneys and not the underlying agency action.

3. Ace Construction Co. v. United States, Ct. Cl. No. 339-81C (September 17, 1982). Petitioner sought an award of approximately $5,000 in attorney's fees. The application was denied on the ground that the government's litigating position was reasonable. In moving for summary judgment and conceding liability in accordance with the recently-established precedent, the court found that the government acted in a commendable manner, fully consistent with the spirit and purpose of the Act.

4. Regent Jack Manufacturing Co. v. Gerald J. Mossinghoff, No. 81-1168-A (E.D. Va. August 20, 1982). Plaintiff brought an action to prevent the Commissioner of Patents and Trademarks from reexamining the validity of two patents owned by the plaintiff. The parties settled the substantive issues in the case and plaintiff then submitted an application for fees. The court denied the petition on the ground that the government's litigation posture was reasonable -- it conceded the correctness of plaintiff's assertions shortly after the filing of the complaint, which the court found was an appropriate response under the circumstances.

5. Estate of Lillian G. Berg, Ct. Cl. No. 310-78 (August 25, 1982). Judge Nichols, in this tax case, denied the attorney's fee request on the ground that the government's refusal to accept Treasury bonds in payment of estate taxes, although incorrect, was not reprehensible conduct and, therefore, the position of the United States was sustantially justified.

6. In Re James Howard Boone, No. 579-01826-M (W.D. La. June 11, 1982). Application was made for an award of attorney's fees and expenses incurred during the course of a bankruptcy proceeding. The court did not decide the question whether the bankruptcy court is authorized to make an award of attorney's fees, but instead went on to hold that the position of the United States was substantially justified in that all of the facts alleged by the United States in the proceeding were found to be true.

7. LeRoy H. Ellis v. United States, Ct. Cl. No. 261-79 (November 2, 1982). In this personnel case, plaintiff sought an award of attorney's fees in the amount of $21,986. The court

denied the application on the ground that the government's position was substantially justified. The court recognized that although the plaintiff was correct in asserting he was entitled to his full annuities (plaintiff was employed by the Navy's Great Lake Fire Department), the government's position in initially denying the benefits was not arbitrary or capricious.

8. Julia Garcia v. HUD, No. 81 Civ. 5943(RJW) (S.D. N.Y. June 20, 1982). Plaintiff had alleged that HUD discriminated against hispanics in the solicitation and processing of applications for a housing unit which was operated by HUD pursuant to the Fair Housing Act. The parties ulitimately negotiated a settlement and plaintiff then moved for an award of attorneys' fees under 42 U.S.C. §1988. The court granted the motion, finding that section 2412(b) of the EAJA authorizes the award of fees pursuant to §1988 against the United States. Looking to the terms of §1988, the court found the plaintiff to be a prevailing party within the meaning of the statute and that plaintiff's lawsuit caused HUD's remedial actions. The parties were given thirty days to agree on the amount of the award.

9. Paul Guthrie v. Schweiker, No. C-80-218-G (M.D. N.C. October 8, 1982). In this Social Security case, plaintiff sought judicial review of HHS' determination that he had not established his disability. The court remanded the matter to an administrative law judge who reversed the decision of the Secretary and determined that plaintiff was entitled to benefits. No appeal was taken by the government from that decision. Thereafter, fees were requested. The court refused to award fees because the plaintiff failed to file the motion within 30 days of the final judgment remanding the matter back to the Social Security Administration.

10. Kay Manufacturing Co. v. United States, Ct. Cl. No. 478-73 (July 30, 1982). In this case before the Trial Division of the Court of Claims, suit was initially filed by plaintiff for a determination that its profits were not excessive under the Renegotiation Act of 1951. After the suit was decided on the merits in its favor, plaintiff filed a petition for fees. The court determined that expenses for services incurred in connection with Renegotiation Board proceedings were not recoverable under the Act. The court did find as to the judicial proceedings that the government's conduct was not substantially justified.

11. Kathleen J. Kincaid v. Major General Smith, No. 79-79-CIV-4 (E.D. N.C. May 13, 1982). Plaintiff originally filed this action to require the Marine Corp to process her application for a position as a temporary limited duty officer because women were excluded from receiving these position under 10 U.S.C. §5596. While the action was pending, Congress enacted the Defense Officer Personnel Management Act amending the above statute to permit women to serve as temporary officers. The court dismissed the action without prejudice for plaintiff to pursue her administrative claims. Plaintiff then filed for attorney's fees. The court denied them on the ground that plaintiff was not a prevailing party in light of the fact that her claim was rendered moot by the legislative action.

12. Regina M. Nunes-Correia v. Haig, No. 74-280 (D.D.C. July 13, 1982). In this case, plaintiff claimed she was illegally forced to resign from her career in the Foreign Service on the basis of an unconstitutional regulation prohibiting employment to a person married to an alien who did not intend to become a United States citizen. She sought reinstatement, back pay and related benefits. The court found that the alien-spouse regulations inpermissibly infringed upon the constitutionally-protected right to marry and granted plaintiff's motion for summary judgment. She then sought fees under the Equal Access to Justice award, which

the court granted. In so holding, the court first denied the government's retroactivity argument and then found that the government failed to prove its burden of substantial justification. The government had contended that the alien-spouse regulations governing Foreign Service personnel had a rational basis. However, the court found that a number of facts demonstrated that the rule failed to meet the rational relationship test.

13. Geraldine M. Shumate v. HHS, No. C-C-79-378-M (W.D. N.C. August 11, 1982). In this Social Security case, the court awarded $4,143.75 in attorneys' fees under 28 U.S.C. §2412(d). First, the court found that there is nothing in the EAJA which expressly excludes its application to Social Security cases, holding that section 206 of the Social Security Act does not authorize the award of attorney's fees against the federal government. Rather, it provides that where a claimant is awarded past-due benefits, the claimant's attorneys may collect a reasonable fee not in excess of 25 percent from his client's award.

14. Broad Avenue Laundry and Tailoring v. United States, CAFC No. 28-81 (November 29, 1982). In this case, petitioner successfully appealed to the Court of Claims from an ASBCA decision denying a upward price adjustment in a government contract. The Court of Appeals for the Federal Circuit denied fees on the ground that the position of the United States in court was substantially justified. The court noted that the mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified.

U.S. Department of Justice
Office of Legal Policy

Herdina
EAJA

Award of Attorney Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act

OFFICE OF LEGAL POLICY

AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN JUDICIAL PROCEEDINGS UNDER THE EQUAL ACCESS TO JUSTICE ACT

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AWARD OF ATTORNEY FEES AND OTHER EXPENSES IN JUDICIAL PROCEEDINGS UNDER THE EQUAL ACCESS TO JUSTICE ACT

I. INTRODUCTION AND PURPOSE OF THE GUIDE

The Equal Access to Justice Act [1/] (the "Act"), which became effective October 1, 1981, permits prevailing parties to obtain awards of attorney fees and other expenses against the United States in certain administrative proceedings and judicial actions. The Act accomplishes this end by creating a new section 504 to Title 5 of the United States Code and by amending 28 U.S.C. 2412. The first of these two provisions, the new section 504, concerns the award of fees and expenses in certain administrative proceedings. The latter provision, the amended section 2412, concerns the award of fees and expenses in certain court cases.

There are a number of forseeable situations in which lawyers from the Department of Justice will soon be called upon to interpret the Act. Department attorneys will be required to respond to petitions by private parties for attorney fees in certain civil actions under amended section 2412. Section 2412(b) would permit a prevailing party to recover attorney fees and other expenses against the United States to the same extent the prevailing party would be entitled by statute or common law to recover those fees against a private party. Section 2412(d) would permit

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1/ Title II of Pub. L. No. 96-481, 94 Stat. 2325 (1980).

prevailing parties who meet the section's eligibility requirements to recover attorney fees against the United States in circumstances where no such awards would otherwise be permitted against private parties.

In addition, Department attorneys may be asked to respond in court to petitions concerning attorney fee awards made in adversary adjudications before federal agencies under 5 U.S.C. 504. Attorney fee issues could arise either in the course of a court's review of the underlying decision of the agency or of a court's review of the agency's treatment of the prevailing party's application for an award. Moreover, Department lawyers may also have to respond to challenges to the validity of the regulations which agencies adopt under the Act.

The purpose of this guide is to provide basic information about the Act to officers of the Department and other federal agencies who will respond to fee applications under it. This guide is not meant to be an exhaustive legal treatise of the Act; court decisions will ultimately interpret the meaning of the various statutory provisions. However, the guide is designed to provide an introduction to the Act, and also to set forth the Department of Justice's policies concerning the requirements of the Act.

II. SUMMARY OF ACT

A. Adversary Adjudications: 5 U.S.C. 504

1. Scope. The Equal Access to Justice Act adds a new section 504 to Title 5 of the United States Code. Under this new provision, a federal agency or department that conducts an "adversary adjudication," [2/] is required (upon application) to award to a party prevailing against the United States attorney fees and other expenses the party incurred. The statute requires that fees be awarded unless the adjudicative officer conducting the proceeding finds (a) that the agency's [3/] position as a party to the proceeding was substantially justified or (b) that special circumstances make an award unjust. [4/] The amount of any award may be reduced, or eliminated, if the prevailing party engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

2. Eligibility. Section 504(b)(1)(B) defines a "party" eligible for an award for prevailing in an adversary adjudication as (i) an individual whose net worth does not

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2/ An "adversary adjudication "under 5 U.S.C. 504(c)(1)(C) is an adjudication under 5 U.S.C. 554 in which the United States' position is represented, but does not include a rate fixing or licensing proceeding.

3/ The statutory language makes it clear that "the agency" against which an award may be made is the agency that conducts the adversary adjudication.

4/ For an analysis of the substantial justification and special circumstances provision, see pp. 33-41 infra.

exceed $1,000,000 at the time the adjudication is initiated or (ii) a partnership, corporation, association, organization, or unincorporated business owned by an individual with (1) a net worth not exceeding $5,000,000 and (2) not more than 500 employees at the time the adjudication begins. Tax-exempt charitable organizations and agricultural cooperative associations are also within the scope of this section, and may recover fees regardless of their net worth, but are still subject to the 500 employee rule.

3. Procedure. A prevailing party seeking an award of fees and other expenses must submit an application within 30 days of final judgment. The application must show that the party is eligible for an award, provide an itemized account of the amounts claimed, and allege that the position of the United States was not substantially justified. Attorney fees are limited to $75 an hour unless the agency provides by regulation that special factors, such as an increase in the cost of living or the limited availability of qualified attorneys, justify an increase.

4. Appeal from Agency Fee Determinations. A party dissatisfied with a fee award or the denial of an award by an agency may obtain judicial review of the award or denial by filing a petition for leave to appeal with the federal court which would have jurisdiction to review the merits of the underlying agency decision. If it grants the petition, the court may modify the award or denial only if

the failure to make the award, or the calculation of the amount of the award, was an abuse of discretion by the agency. The denial of a petition for leave to appeal is not reviewable.

5. Regulations. In consultation with the Administrative Conference of the United States, all agencies are required to establish uniform procedures for the submission and consideration of applications for the award of fees and other expenses. The Administrative Conference is also required to prepare an annual report to Congress on the amount of fees and nature of fee awards in order to assist Congress in evaluating the scope and impact of the legislation.

6. Effective Date and Sunset Provision. Section 504 applies to any adversary adjudication pending on October 1, 1981. Under a sunset provision section 504 is repealed at the end of three years. However, any adversary adjudication commenced before the date of repeal continues to be covered.

B. Judicial Proceedings: 28 U.S.C. 2412

1. Preservation of Former Law: Award of Costs.

The Act preserves the former law (28 U.S.C. 2412 (1976)) in a new section 2412(a). New section 2412(a) provides for the discretionary award of costs, not including

attorney fees and expenses, in any civil action brought by or against the United States.

2. Section 2412(b): Attorney Fees Under Common Law and Specific Statutes.

(a) Applicability of Section 2412(b). The Act adds a new section 2412(b) which modifies in some situations the traditional statutory prohibition against award of attorney fees by or against the United States in civil actions. Under new section 2412(b), a court may award reasonable fees and expenses to a prevailing party in any civil action brought by or against the United States or any agency, or official of the United States acting in his or her official capacity where the common law or the express provision of a statute would permit an award of attorney fees against any other party.

(b) Source of Funds. Fees awarded under 28 U.S.C. 2412(b) are to be paid by the General Accounting Office from the permanent indefinite appropriation, commonly known as the judgment fund, as provided in 28 U.S.C. 2414 and 28 U.S.C. 2517. If the basis for the award is the common law ground that an agency or offical of the United States acted in bad faith, then under 28 U.S.C. 2412(c)(1), the agency that acted in bad faith is required to pay the fee award, in addition to any relief provided in the judgment.

(c) Effective Date. Section 2412(b) applies to cases pending as of October 1, 1981 and is not subject to a sunset provision.

3. 28 U.S.C. 2412(d): Special Rule for Attorney Fees Against the United States.

Section 2412(d) provides for the recovery of attorney fees and expenses against the United States in civil actions by prevailing parties who meet eligibility requirements similiar to those required for the award of fees under 5 U.S.C. 504. Under section 2412(d), a court is authorized in a civil action, other than a tort case, to award to an eligible party prevailing against the United States fees and other expenses incurred, unless the court finds: (1) that the position of the United States was substantially justified; or (2) that special circumstances make an award unjust. Under section 2412(d), fee awards are limited to $75 per hour, unless the cost of living or the limited availability of qualified attorneys justifies a higher fee. As under 5 U.S.C. 504, the amount of any award may be reduced or denied to the extent that conduct by the prevailing party unduly and unreasonably protracted final resolution of the matter in controversy.

(a) Procedures. A prevailing party seeking an award of fees and other expenses under section 2412(d) must submit an application for fees and expenses within 30 days of the final judgment in the civil action. The

application must include a showing of eligibility, an itemized statement of the amount sought and an allegation that the position of the United States was not substantially justified.

(b) Judicial Review of Agency Adversary Adjudication. In an action for judicial review of the merits of an adversary adjudication by a federal agency (as defined in the new section 504) or of an adversary adjudication subject to the Contracts Disputes Act of 1978, the court is required to award the prevailing party, fees and expenses to the same extent as the agency involved would be required to under the new 5 U.S.C. 504(a), unless it finds that the position taken by the United States was substantially justified or that special circumstances make an award unjust.

(c) Source of Funds. The Act provides that fees and other expenses awarded under section 2412(d) may be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise for such purpose. Where an agency does not pay the fees and other expenses, they are to be paid in the same manner as the payment of final judgments in accordance with sections 2414 and 2517 of Title 28. However, the payment of fees and other expenses from the judgment fund is authorized

only when such amounts are provided in advance in appropriations acts. 5/

(d) Effective Date and Sunset Provision. Section 2412(d) applies to cases pending as of October 1, 1981. It is subject to a sunset provision repealing the section on October 1, 1984. Any action commenced before the date of repeal, however, will continue to be covered by this provision. There is no comparable sunset provision with respect to 28 U.S.C. 2412(a) or (b).

(e) Annual Reports. An annual report is required to be submitted to Congress by the Director of the Administrative Office of the United States Courts concerning the nature and amount of fee awards.

C. Repeal of Other Laws

The Act also repeals Rule 37(f) of the Federal Rules of Civil Procedure, which prohibits awards of attorney fees against the United States as a sanction in pretrial discovery, as well as that portion of 42 U.S.C. 1988 which provided for attorney fees against the United States in cases brought by or on behalf of the United States to enforce the Internal Revenue Code.

5/ As yet, there have been no appropriations for this purpose.

III. SECTION 2412: FEE AWARDS IN JUDICIAL PROCEEDINGS

A. Distinctions Between Section 2412(b) and Section 2412(d)

The Equal Access to Justice Act contains two very different attorney fee provisions applicable in judicial proceedings. The new section 2412(b) effectively removes the blanket bar in the old section 2412 against awarding attorney fees in civil suits against the government. Thus, the courts may now award attorney fees against the United States to the same extent as against any other party "under the common law or under the terms of any statute which specifically provides for such an award." The other attorney fee provision, section 2412(d), permits a prevailing party who meets special eligibility requirements, unless the government shows that its position was "substantially justified" or that special circumstances make an award unjust [6/] to recover fees against the United States in certain civil cases where no right to award of attorney fees exists against private parties.

6/ Section 2412(b) does not mention special circumstances as a limiting factor in making attorney fees awards. However, many of the fee provisions applicable to the nonfederal parties, either expressly or through judicial interpretation, authorize courts to decrease or deny attorney fees in special circumstances. For example, the Civil Rights Attorneys Fees Awards Act of 1976 has been interpreted to permit courts to deny attorneys fees based upon special circumstances. Therefore, it is important to check the applicable fees provisions to ascertain whether special circumstances should be considered by the courts in making fee awards.

The essential difference between these two provisions is that section 2412(b) permits any prevailing party to recover attorney fees against the United States, but only in circumstances where the common law or a particular statute would subject any other party to a fee award. Section 2412(d), on the other hand, authorizes attorney fee awards against the United States in all other types of cases (except torts), but only if the party seeking attorney fees meets special eligibility requirements.

There are other key differences as well. Under section 2412(b), for example, different standards could be applicable in determining whether to grant an award if the party prevailing is a plaintiff rather than a defendant. In civil rights cases, for instance, a prevailing plaintiff ordinarily is entitled to attorney fees unless special circumstances would render an award unjust. Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421 (1978). But a prevailing defendant is not routinely entitled to fees and should receive them only upon a finding that a plaintiff's action was "unreasonable, frivolous, meritless or vexatious." Id. Thus, under section 2412(b), parties may receive different treatment because the underlying fee provisions themselves discriminate between plaintiffs and defendants. On the other hand, under section 2412(d) a uniform standard is used for awarding attorney fees to both eligible plaintiffs and eligible defendants:

fees will be awarded to a prevailing party unless the government's action was substantially justified or special circumstances would make an award unjust. 7/

B. Application of Section 2412(b)

1. Recovery under Common Law. Under section 2412(b), the United States or any agency or official of the United States acting in his or her official capacity may be liable for attorney fees where American common law would permit attorney fees to be awarded. The principal common law grounds for attorney fees are the "bad faith" and "common fund" (or "common benefit") theories. The "bad faith" theory allows an award where a party has willfully disobeyed a court order or has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Under the "common fund" or "common benefit" theory, a court may award attorney fees to a party whose legal action creates or

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7/ Other differences are that in situations governed by section 2412(b): (1) there is no automatic repeal provision; (2) although "reasonable" fees and expenses of attorneys may be awarded, there is no $75 hourly limitation on attorney fees; (3) there are no financial eligibility requirements; and (4) awards are payable from the general judgment fund. The only exception to payment from the judgment fund is when the court bases an award upon the "bad faith" exception. In that situation, section 2412(c)(2) requires that fee awards must be paid from the appropriation of the agency found to have acted in bad faith.

preserves a fund of money, or obtains a benefit, for others as well as itself. The theory is applicable whether or not money is at issue. Substantial nonpecuniary benefits can trigger the exception. Fees may be obtained from the fund or from other parties enjoying the benefits of the claim. H.R. Rep. No. 96-1418, 96th Congress, 2d Sess. at 8.

2. Recovery Under Specific Statutes. In addition to the common law theories, the United States may be liable for reasonable attorney fees under section 2412(b) whenever a statutory provision specifically authorizes attorney fees against a nonfederal party, except where expressly prohibited. Examples of statutes which expressly prohibit attorney fees against the United States include, but are not limited to, the Federal Tort Claims Act, the Age Discrimination Act, and the Equal Pay Act, etc.

3. Suits Against Federal Officers.

(a) Suits Against Officers Acting in Personal Capacity. Prevailing plaintiffs may argue that section 2412(b) subjects the United States to liability for attorney fees in suits where federal personnel have been held personally liable for monetary damages under either common law or constitutional tort theories. However, the Act plainly does not apply to tort cases in which the Department defends federal officials in actions seeking recovery of damages from their own personal resources. Section 2412(b) speaks in terms of civil suits "brought by or against the United

States or any agency and officials of the United States acting in his or her official capacity ...." Similar language in 28 U.S.C. 1391(e) establishing venue for civil actions "in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority," has been held not to include an action seeking recovery from an official's private pocket for damages caused by his official acts. 8/ Stafford v. Briggs, 444 U.S. 527 (1980).

(b) Consititutional Tort Actions. Likewise, the Department does not believe that Section 2412(b) supports an award of attorney fees in a constitutional tort action seeking monetary damages against the United States or any agency or official of the United States sued in an official capacity. The United States can be sued for monetary damages only if it waives its sovereign immunity. United States v. Testan, 424 U.S. 392, 399 (1976). To date, the United States has not consented to be sued for monetary damages in constitutional tort actions. See Duarte v. United States, 532 F.2d 850, 852 (2d Cir. 1976); compare Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978).

8/ The capacity in which the official is named in the complaint should not be dispositive. A complaint in an individual capacity suit typically seeks money damages from the defendant official for acts taken in his official capacity, without specifying that the defendant is sued in his individual capacity.

C. Application of Section 2412(d).

Section 2412(d) essentially provides that in civil actions brought by or against the United States, eligible prevailing parties shall be awarded attorney fees and other expenses unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. Section 2412(d) does not apply in tort actions, in actions under statutes which specifically subject the United States to fee awards and in actions covered by section 2412(b).

1. Eligible Parties. Section 2412(d) is primarily designed to benefit small businesses and individuals of average means. The eligibility requirements of the section are discussed at length below. See pp. 20-27, infra.

2. Tort Actions. Section 2412(d)(1)(A) expressly excludes prevailing parties in tort actions from receiving attorney fees. 9/ Somewhat inexplicably, however, the House Judiciary Committee Report, H.R. Rep. No. 96-1418, supra, at 18, states that the exclusion for cases "sounding in tort" does not encompass constitutional torts. No explanation is given for the House Committee Report's conclusion, and neither the Senate Committee Report nor the Conference

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9/ S. Rep. No. 96-253, 96th Cong., 1st Sess. at 20; H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. at 25; H.R. Rep. No. 96-1005, pt. 1, 96th Cong., 2d Sess. at 18.

Report contains such language. In view of the express and unambiguous statutory language excluding all torts, the Department's position is that all tort cases, including those alleging constitutional torts, are excluded from coverage by section 2412(d)(1)(A).

3. Judicial Review of Agency Decisions. Section 2412(d)(3) applies to judicial actions reviewing decisions made by agencies in adversary adjudications or made in adversary adjudications under the Contract Disputes Act. In such cases, the court is required to include in the award fees and other expenses to the same extent as authorized under 5 U.S.C. 504(a).

4. Effect on Other Laws. Section 2412(d) is not intended to modify or replace existing federal authorizations for attorney fees and other expenses against the United States. 10/ Title 28, section 2412(d)(1)(A) provides that "[e]xcept as otherwise provided by statute", a court is authorized to award fees and other expenses to prevailing parties in civil actions against the United States (other than cases sounding in tort) unless the government's position is found to have been substantially justified. The legislative history indicates that the "[e]xcept as otherwise provided by statute" clause was intended to preserve the standards, and case law, under existing federal

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10/ P.L. 96-481, section 206; 28 U.S.C. 2412 note.

fee-shifting statutes, such as the Freedom of Information Act, Titles II and VII of the Civil Rights Act of 1964, and the Voting Rights Act, and to insure the application of the Act "only to cases (other than tort cases) where fee awards against the government are not already authorized". 11/ Indeed, the Act itself specifies that nothing in section 2412(d) "alters, modifies, repeals, invalidates, or supersedes any other provision of federal law which authorizes an award of such fees and other expenses". 12/

D. Summary of Methods of Obtaining Fees in Civil Actions

In summary, there are three avenues, each mutually exclusive, by which parties may seek fee awards in civil actions against the United States:

First, if an action is litigated under a statute such as the Freedom of Information Act, which specifically permits fee awards against the United States, the prevailing party must seek fees under that statute's provisions, whether those provisions are broader or narrower than those contained in the Equal Access to Justice Act.

Second, if an action is litigated under a statute which permits fee awards against private parties but does

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11/ H.R. Rep. No. 96-1418, supra.

12/ P.L. 96-481, section 206; 28 U.S.C. 2412 note.

not expressly permit fees against the United States, the party seeking fees must seek them under 28 U.S.C. 2412(b).

Third, if an action is litigated under a statute, such as the Food Stamp Act, which contains no fee-shifting provision whatsoever, and no common law ground applies, the party seeking fees must seek them under 28 U.S.C. 2412(d).

It should also be noted that, if an action is litigated under a statute which does not permit the recovery of fees, but the prevailing party is able to show one of the common law grounds for an award of attorney fees -- such as the creation of a common fund -- then the party seeking fees must seek them under section 2412(b).

E. Fee Awards in Judicial Actions Reviewing Agency Decisions in Adversary Adjudications: 5 U.S.C. 504 and 28 U.S.C. 2412(d)

1. Court Review of Agency Fee Determinations. A prevailing party dissatisfied with an agency fee determination under 5 U.S.C. 504(c)(2), may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the adversary adjudication, as that term is used in section 504. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, the court may modify the determination only if

it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

The proper response by Department lawyers to a petition for leave to appeal or to an appeal when granted depends upon the facts and circumstances of each case. In the ordinary case, however, the reason for the denial of an award -- because the adjudicative officer found that the position of the agency was substantially justified or that special circumstances made an award unjust -- or a reduction in the amount to be awarded -- because the adjudicative officer found either that the applicant engaged in conduct which unduly and unreasonably protracted the final resolution of the matter or that the fees or hours were not reasonable -- should constitute the basis for opposing a petition for leave to appeal or appeal.

2. Court Review of Agency Decisions on the Merits.

Under 5 U.S.C. 504(c)(1), if a court reviews the underlying decision made by the agency in the adversary adjudication, an award for both the adjudication and appeal may be made only by the court pursuant to 28 U.S.C. 2412(d)(3). This provision has several effects. If a party does not prevail in an adversary adjudication but does prevail in a civil action for judicial review of the adversary adjudication, then the court shall include in its award under 28 U.S.C. 2412(d) an amount for fees and expenses incurred in connection with the adversary adjudication, unless the court finds

that during the adversary adjudication the position of the agency was substantially justified or that special circumstances make an award unjust. If a party prevails in an adversary adjudication but does not prevail in a civil action for judicial review of the agency's adversary adjudication, no award for fees or other expenses incurred in connection with the adversary adjudication may be made. If a party prevails both in the adversary adjudication and in the civil action for judical review, an award for fees and expenses incurred in connection with the adversary adjudication shall be made by the reviewing court, unless the court finds that during such adversary adjudication the position of the agency was substantially justified or that special circumstances make an award unjust. In the last case, the award by the reviewing court will supersede any prior action of the agency in responding to an application for an award in connection with the adversary adjudication.

IV. ELIGIBLE AND PREVAILING PARTIES [13/]

A. Determination of Eligible Parties Under Section 2412(d)

Under 28 U.S.C. 2412(b), a party may seek attorney fees against the United States if he or she prevails in

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13/ Although this section will discuss the eligibility of a party under 28 U.S.C. 2412(d), a party seeking an award for fees and expenses in connection with an agency adjudication pursuant to section 2412(d)(3) must also establish that it satisfies the eligibility requirements of 5 U.S.C. 504.

civil action under a statute which would provide for attorney fees against another private party or if he or she establishes one of the common law grounds to recover attorney fees. 14/ On the other hand, to be a prevailing party eligible for an award of attorney fees and expenses under 28 U.S.C. 2412(d), an applicant must meet specific statutory criteria. The term "party" is defined in section 2412(d)(2)(B) as follows:

> '[P]arty' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the new worth of such organization or cooperative association, or (iii) a sole owner of an unicorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed....

The term "party" is also defined in 5 U.S.C. 504, but because of drafting error the definition of "party" under section 2412(d)(2)(B) could be read more broadly than the definition contained in 5 U.S.C. 504(b)(1)(B). The broader reading of section 2412(d)(2)(B) would permit a business

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14/ For a discussion of who qualifies as a "prevailing" party, see pp. 27-28 infra.

that has 500 or fewer employees to be regarded as a "party" eligible for fees and expenses, even if its net worth is more than $5 million.

1. Eligibility Based on Net Worth and Number of Employees. The effect of the definitions of "party" in sections 504(b)(1)(B) and 2412(d)(2)(B) is to exclude from eligibility for an award certain categories of persons. Both definitions contain three exclusions: (a) a $1 million net worth exclusion for individuals, (b) a $5 million net worth exclusion for businesses, and (c) a 500 employee exclusion. Under these definitions, an individual having a net worth of more than $1 million is not an eligible party; nor is a sole owner of a proprietorship, 15/ a partnership, association, corporation or private organization eligible if its net worth exceeds $5 million. Certain tax-exempt organizations and agricultural cooperatives, however, are not subject to a net worth limitation.

For the most part, the definition of an eligible party is the same under 5 U.S.C. 504 and 28 U.S.C. 2412(d). Due to a drafting error in section 2412(d), though there is a potential difference in eligibility standards under the two definitions because of the different way the two

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15/ It should be contended that an individual is subject to the $1 million limitation when suing in a personal capacity and to the $5 million limitation when suing in the capacity of sole proprietor. Both personal and business assets should be taken into account in calculating either net worth limitation.

sections handle the 500 employee limitation. Under Section 504(b)(1)(B), an eligible business must not have more than $5 million in net worth or more than 500 employees. Section 2412(d)(2)(B), however, can be read to mean that any business is eligible -- even if it has more than $5 million in net worth -- so long as it has no more than 500 employees.

The Department takes the position that the two sections should be governed by a single standard, and that the proper standard is found in section 504(b)(1)(B). The legislative history of the Act states that the definition of "party" in section 2412(d)(2)(B) is intended to parallel the definition of "party" contained in section 504(b)(1)(B). H.R. Rep. No. 96-1418, supra, at 18; S. Rep. No. 96-253, supra, at 21. The Committee Reports clearly indicate that the $5 million net worth and 500 employee tests are interdependent, with the result that both standards must be satisfied before a sole proprietor or organizational party will be eligible. H.R. Rep. No. 96-1418, supra, at 15; S. Rep. No. 96-253, supra, at 17. Therefore, Department attorneys should contend that the definition of eligible party under section 2412(d)(2)(B), in the context of the Act as a whole and the legislative history, is the same as the definition under section 504(b)(1)(B). See Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 439-44 (1955).

For the purpose of determining eligibility, the net worth and number of employees of an applicant are to be determined as of the date the civil action was initiated. In an agency adjudication, net worth and number of employees are to be determined as of the date the adversary adjudication was initiated. 5 U.S.C. 504(b)(1)(B).

2. Specific Issues in Determining Eligibility.

(a) Employees. Neither the Act, nor its legislative history, offers any assistance in defining who is an employee. Accordingly, the Department has determined to apply the common law definition of "employee" in resolving questions which might arise with regard to the status of persons as employees. 16/ Generally employees include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control.

(b) Net Worth. The term "net worth" is not defined in the Act, but the legislative history offers some help on this point. The Committee Reports state that net worth "is calculated by subtracting total liabilities from total assets. In determining the value of assets, the cost of acquisition rather than fair market value should be

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16/ The withholding tax regulations, Treasury Regulations on Employment Tax, section 31.3401(c)-1, (28 C.F.R.) reflect the common law definition of employee and a substantial body of case law exists concerning the common law definition.

used". S. Rep. No. 96-253, supra, at 17; H.R. Rep. No. 96-1418, supra, at 15.

(c) Trust and Estates. Neither a trust nor an estate is included within the definition of "party" in section 2412(d)(2)(B). The Department's policy therefore is to oppose any application for a fee award under section 2412(d) made on behalf of a trust or an estate on the ground that it is not an eligible party.

(d) Governmental Bodies. In testimony before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, a Senate sponsor of the legislation stated that governmental bodies were not intended to be covered by the Act. House Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, May 20 and June 24, 1980, 96th Cong., 2d Sess. at 31-32. Based on this testimony and the general congressional intent reflected in the legislative history for the Act to benefit small businesses, the Department will contend that a governmental body cannot be an eligible party under the Act.

Even if a court were to hold that a governmental body could be an eligible party, it should be noted that a governmental body may not avoid the $5 million net worth limitation by claiming it is a tax exempt organization under section 501(c)(3) of the Internal Revenue Code. It is clear

that a state or municipality itself cannot qualify as a section 501(c)(3) organization although an entity separately organized by the state or municipality, such as a college or hospital may qualify. Rev. Rul. 60-384, 1960-2 C.B. 172; See Old Colony Trust Company v. U.S., 438 F.2d 684 (1st Cir., 1971).

(e) Parties Controlled by Another.

Department attorneys should oppose fee awards to prevailing parties controlled or financed by another corporation or entity and whose combined net worth is more than $5 million. Similarly, Department attorneys should oppose a fee award to a trade association or other business organization litigating to vindicate the interests of businesses that would not themselves qualify under the Act. That situation may constitute a "special circumstance" under section 2412(d), making an award unjust in view of the legislative intent to limit relief to small businesses. Accordingly, the net worth of affiliates should be raised in proceedings involving a section 2412(d) award.

Similarly, any transfers of assets by the applicant prior to the date on which the proceeding was initiated that reduced the net worth of the applicant below the applicable net worth ceiling should be closely examined for legitimate business or other purpose.

3. Summary. The following should be deemed eligible applicants:

1. An individual with a net worth of not more than $1,000,000;
2. The sole owner of an unicorporated business who has a net worth of not more than $5,000,000 and not more than 500 employees;
3. A charitable or other tax exempt organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C.) with not more than 500 employees;
4. A cooperative association as defined in Section 15(a) of the Agricultural Marketing Act, Ch. 24, 46 Stat. 11 (12 U.S.C. 114j(a)) with not more than 500 employees, and;
5. Any other partnership, corporation, association, or organization with a net worth of not more than $5 million and not more than 500 employees.

B. Determination of Prevailing Party

Under both sections 2412(b) and (d), parties are entitled to attorney fees only if they have prevailed on the merits of their claims.

The legislative history indicates that Congress intended the interpretation of the term "prevailing party" to be consistent with interpretations of that term developed in case law. H. Rep. No. 96-1418, supra, at 11; S. Rep. No.

96-253 supra, at 7-8. Under statutes such as Titles II and VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, a party who gains sufficient relief through full litigation of issues or through a favorable settlement is considered to be the prevailing party. 17/

1. Interim Awards. The term "prevailing party" usually means the party who, at the conclusion of the case, wins on the main issue or defends successfully against it. Parker v. Matthews, 411 F. Supp. 1059, 1063 (D.D.C. 1976), recognized, however, the propriety of an interim fee award to a party prevailing on a significant, separable claim on the merits before termination of the litigation even though ultimately the party may not prevail on all issues.

17/ It should be noted, however, that awards of attorney fees are not automatic and that the standards for granting awards may differ depending upon which fee award statute is applicable. In opposing fee awards sought under section 2412(b), therefore, it is important to use the correct standard, for the courts may not have interpreted all fee statutes as liberally as they have interpreted those contained in civil rights statutes.

In addition, it should be noted that in civil rights suits the courts use a much stricter standard if the prevailing party is a defendant. A prevailing defendant is not entitled to recover attorney fees unless a court finds that its opponent's claims were "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978); Carrion v. Yeshiva University, 535 F.2d 722, 727 (2d Cir. 1976).

Under section 2412(d), however, the same standard is used for both prevailing plaintiffs and defendants.

Van Hoomissen v. Xerox Corp., 503 F.2d 1131, 1133 (9th Cir. 1974). Thus if a party establishes an entitlement to sufficient relief on the merits of a claim central to its case, it may be eligible for an interim award of attorney fees. See Hanrahan v. Hampton, 446 U.S. 754, 757 (1980); Bradley v. Richmond School Board, 416 U.S. 696, 724 (1974); Grubbs v. Butz, 548 F.2d 973, 976 (D.C. Cir. 1976).

The fact that a party prevails on a procedural or evidentiary ruling, however, is not enough to make it a prevailing party entitled to attorney fees. Hanrahan, supra, at 757. Similarly, the fact that a party prevails on a preliminary injunction is not dispositive; the determining factor is whether the party obtained a final, discrete, substantial determination on the merits. Smith v. University of North Carolina, 632 F.2d 316, 346-53 (4th Cir. 1980). In Hanrahan, supra, the Supreme Court rejected the notion that a party prevailing on a procedural or evidentiary ruling is entitled to attorney fees as a prevailing party under the Civil Rights Attorney's Fee Awards Act of 1976. See also Smith v. University of North Carolina, supra, at 350-51 and Grubbs, supra, at 976, in which the Courts of Appeals denied counsel fees to plantiffs who had obtained preliminary injunctions because no determinations had been made yet on the merits of their claims.

The legislative history of the Act indicates that, although Congress recognized the propriety of awarding

attorney fees to prevailing parties before the end of the case, it was plainly the intent of Congress to permit interim awards only when a party had established an entitlement to relief on the merits of one or more important claims. H.R. Rep. No. 96-1413, supra, at 11, S. Rep. No. 96-253, supra, at 7-8. The cases cited in the Committee Reports describing the situations considered suitable for award of interim fees (Bradley, Parker, and Van Hoomissen, supra) are limited to parties who had prevailed on the merits of some of their claims. In those circumstances, even though formal relief had not been granted, the courts recognized the propriety of interim awards.

Thus, interim fees are the exception to the rule and applications for interim fees should be ordinarily vigorously opposed. Otherwise, the government may end up subsidizing the losing party's suit. 18/ Grubbs, supra, at 976.

In opposing interim attorney fees, the government should also point out to the court that adjudication of attorney fees liability prior to exhaustion of all appeals may waste valuable judicial resources because the very judicial determination upon which a plaintiff must rely to

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18/ Moreover, interim fee awards should be opposed in administrative proceedings on the additional ground that, under Section 504(c)(1) of the Act, only courts may award attorney fees when an appeal is taken from the agency's decision in an adversary adjudication.

establish its claim to attorney fees cannot be finally determined until the completion of appellate review of the district court judgment entered in the case.

The government should also advise the Court that under Federal Rule of Civil Procedure 62(e) it is entitled to an automatic stay of monetary relief against the United States when it appeals. Thus, as a practical matter, trying the attorney fees issue will not result in payment of fees until completion of the appellate process in any event.

2. Settlement. Under established case law, a party may prevail without obtaining a formal, favorable adjudication. Parker v. Matthews, supra, at 1062-1064. A party may prevail, for example, by obtaining a favorable settlement and is entitled to use it as the basis for an attorney fees award. Maher v. Gagne, 448 U.S. 122, 129-30 (1980). But not all settlements justify the award of attorney fees. As the court stressed in Parker, the facts and circumstances surrounding a particular settlement must be carefully evaluated:

> ...whether to award attorney's fees where there has been a settlement of a Title VII lawsuit must be determined by a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the successful party with respect to the central issue -- discrimination.

Parker v. Matthews, supra, at 1062-64.

In addition, although modest relief might entitle the settling party to attorney fees, the degree to which the party prevails is a very important factor in calculating the size of the award. If the party has obtained minimal remedial relief through settlement, this should be argued to the court as the basis for reducing the attorney fees award.

Because a party can prevail through a favorable settlement, the amount of potential attorney fees will be a significant factor to be considered carefully in determining whether it would be in the best interest of the government to settle. Thus, the government should try, whenever possible, to negotiate and agree on merits and fees issues in one settlement package. 19/

Some courts perceive a conflict of interest that prevents simultaneous negotiation of fees and merits claims, for example, when the attorney and client are paid from one fund. However, conflicts clearly do not arise in circumstances where statutorily authorized fees are not paid out of the plaintiff's recovery. 20/

19/ This does not mean, however, that agreement on fees must always be reached before settling a case on the merits. Sometimes, despite the inability of the parties to agree on fees and costs, the facts of an individual case may make it more advantageous for the government to settle the merits and resolve the fees issues separately.

20/ For some of the factors to be considered in assessing the propriety of including fees as part of settlement

[Footnote continued on following page.]

Indeed, White v. New Hampshire Department of Employment Security, 629 F.2d 697 (1st Cir. 1980) cert. granted, 101 S. Ct. 1692 (May 18, 1981), and the Manual for Complex Litigation expressly approve simultaneous settlement of fees and relief in class action settlements. "Only if the aggregate of all payments to be made by the defendants is disclosed in the proposed settlement can the class members and the court make any intelligent judgment as to the fairness and reasonableness of a proposed settlement." 1 Moore's Federal Practice (Manual for Complex Litigation), Part 2, § 1.46 at 74 (1977).

V. SUBSTANTIAL JUSTIFICATION AND SPECIAL CIRCUMSTANCES

Under the newly enacted 28 U.S.C. 2412(d)(1), an otherwise eligible prevailing party is entitled to attorney fees and expenses from the United States "unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). This provision applies to all civil actions except those sounding in tort, those already covered by existing fee-shifting statutes, and those that are relegated exclusively to recovery under section 2412(b). S. Rep. No. 96-253, supra, at 20.

[Footnote 20 continued.]
packages, compare Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980) (approving settlement which provided for attorney fees) with Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977) and Prandini v. National Tea Co., 585 F.2d 47 (3d Cir. 1978) (modifying settlement agreement which provided for attorney fees).

A. Raising the Issue of Substantial Justification and Burden of Proof

According to section 2412(d)(1)(B), a party seeking an award of fees is required to submit an application for fees within 30 days of final judgment. 21/ The Department takes the position that the 30-day period in which the applicant must file an application for attorney fees is jurisdictional and cannot be waived. See Wallis v. United States, Ct. Cl. No. 453-79C (trial judge's order filed November 25, 1981); Soriano v. United States, 352 U.S. 270 (1957); cf. Reeves v. Department of the Army, App. 11-81 (Ct. Cl. Order decided July 24, 1981). Therefore, the Department will oppose all motions for enlargement of this period and will take the position that applications filed after the 30-day period should be dismissed.

In the application, the prevailing party must allege that the position of the United States was not substantially justified. Although the Act itself does not address the question of a government opposition to a fee application, the legislative history indicates that, if the government does not oppose the application for fees, Congress intends that the award should be granted. S. Rep. No. 96-253, supra, at 21. H.R. Rep. No. 96-1418, supra, at 18. But see Rule 55(e) of the Federal Rules of Civil Procedure.

21/ The legislative history of the Act indicates that, under certain circumstances, interim awards may be appropriate. H.R. Rep. No. 96-1434 (Conf. Rep.) 96th Cong., 2d Sess. 22 (1980); S. Rep. No. 96-253, supra, at 7, 21; H.R. Rep. No. 96-1418, supra, at 11, 18. See discussion under "Prevailing Party," supra at 27-31.

When a prevailing party has submitted an application for an award, the burden of proving that an award should not be made rests with the government. S. Rep. No. 96-253, supra, at 21; H.R. Rep. No. 96-1418, supra, at 18. Although the facts and legal analysis upon which the government relies will already be in the record, a concise statement as to the government's position in opposition will still be required. If special circumstances exist that would make an award unjust, 22/ they should be set forth in opposition.

Should the applicant attempt to discover any motives and reasons for the position taken by the United States which the applicant alleges is not substantially justified, the government will oppose such discovery. Disclosure of policy materials such as opinions, recommendations and advice generated in the process of deciding whether a matter should be litigated will stifle frank and open discussions within the government. Kaiser Aluminum & Chemical Corporation v. United States, 157 F. Supp. 939 (Ct. Cl. 1958); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd on opinion below, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967). In addition, to the extent that the material sought is covered by the attorney client privilege or constitutes attorney work product (i.e. material prepared in

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22/ See discussion of special circumstances, infra at 40.

contemplation of litigation) the government will assert the applicable doctrine. Hickman v. Taylor, 329 U.S. 495 (1947): National Labor Relations Board et. al. v. Sears, Roebuck & Co., 421 U.S. 132, 155 (1975).

The record of the proceeding should be the basis for determining whether the case had a reasonable basis both in law and fact. See infra at 37.

B. The Meaning of "Substantially Justified" and "Special Circumstances"

1. "Substantially Justified": Legislative History. According to the Judiciary Committee Reports of the Senate and the House [23/] the "substantially justified" standard represents a compromise between the dual standards under the Civil Rights Acts as articulated in Newman v. Piggie Park, 390 U.S. 400 (1968) (prevailing plaintiffs should ordinarily recover their attorney fees), and Christiansburg Garment, supra, at 421 (prevailing defendants should recover fees only upon a finding that a plaintiff's action was frivolous, unreasonable or without foundation). The Senate Report points out that the Piggie Park standard was rejected as inappropriate because it might have "a chilling effect on reasonable government enforcement efforts." S. Rep. No. 96-253, supra, at 6. The Christiansburg Garment

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23/ The discussion of the "substantially justified" standard contained in these reports is virtually identical. See S. Rep. No. 96-253, supra, at 6-7 and H.R. Rep. 96-1418, supra, at 10-11.

standard [24/] was rejected as inadequate because "it simply would not overcome the strong disincentives to the exercise of legal rights which now exist in litigation with the government." Id.

Congress has characterized the standard as one of reasonableness:

> The test of whether or not a government action is substantially justified is essentially one of reasonableness. Where the government can show that its case had a reasonable basis both in law and fact, no award will be made.

S. Rep. No. 96-253, supra, at 6; H.R. Rep. No. 96-1418, supra, at 10. Moreoever, both committees emphasize that:

> The standard, however, should not be read to raise a presumption that the government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the government to establish that its decision to litigate was based on a substantial probability of prevailing.

S. Rep. No. 96-253, supra, at 7; H.R. Rep. No. 96-1418, supra, at 11.

By way of specific example, the committee reports both state:

> A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim has been

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24/ The Department of Justice had urged Congress to adopt the Christiansburg Garment standard.

> dismissed. Such cases clearly raise the possibility that the government was unreasonable in pursuing the litigation.

S. Rep. No. 96-253, supra, at 6-7; H.R. Rep. No. 1418, supra, at 11.

2. "Substantially Justified": The Rule 37 Analogy. According to the legislative history of the Act, the language "substantially justified" was adopted from the standard in Rule 37. S. Rep. No. 96-253, supra, at 21; H.R. Rep. supra, at 18. The Senate Report expressly refers to the notes of the Advisory Committee on Civil Rules concerning the 1970 amendments to Rule 37, subdivision (a)(4).

Rule 37(a)(4) provides that reasonable expenses, including attorney's fees, shall be awarded to the prevailing party on a motion for an order compelling discovery unless the court finds that the position of the losing party was "substantially justified". The standard was characterized by the Advisory Committee's notes on the Rule, as follows:

> On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party

> from pressing to a court hearing frivolous requests for or objections to discovery.

48 F.R.D. at 540 (emphasis supplied). Thus according to the Advisory Committee, Rule 37(a)(4) contemplates an award only where "no genuine dispute exists."

A brief survey of recent cases [25/] arising under Rule 37(a)(4) reinforces the notion that fees are not awarded absent "captious or frivolous conduct," Baxter Travenol Laboratories Inc. v. Lemay, 89 F.R.D. 410 (S.D. Ohio 1981); an "indefensible" position (where the losing party had conceded the relevance of the documents withheld and that no privilege existed, and had failed to show that the requests were overly burdensome), Persson v. Faestel Investments, Inc., 88 F.R.D. 668 (N.D. Ill. 1980); or failure to answer, object to or request additional time in response to a discovery request, Shenker v. Sportelli, 83 F.R.D. 365 (E.D. Pa. 1979); Addington v. Mid-American Lines, 77 F.R.D. 750 (W.D. Mo. 1978). The standards applied to Rule 37(a)(4) have been "reasonableness," SCM Societa Commerciale S.P.A. v. Industrial and Commercial Research Corp., 72 F.R.D. 110 (D. Tex. 1976) or "good faith,"

25/ According to the Advisory Committee's Note, 48 F.R.D. 487, 538-40, a 1970 amendment shifted the burden of persuasion to avoid a fee award to the losing party. Thus, in examining the Rule 37 "substantially justified" standard, it is important to distinguish between pre- and post-1970 decisions.

Technitrol, Inc. v. Digital Equipment Corp., 62 F.R.D. 91 (N.D. Ill. 1973).

Thus, by expressly adopting the Rule 37(a)(4) standard in the Act, Congress has indicated its intent that fees should not be awarded against the government unless the government's position is found to be unreasonable or the government has sued or defended in a situation where no genuine dispute exists.

3. "Special Circumstances". In addition, the Act provides that the government should not be held liable where "special circumstances make an award unjust." The committee reports both explain the meaning of this provision as follows:

> This "safety valve" helps to insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

S. Rep. No. 96-253, supra, at 7; H.R. Rep. No. 96-1418, supra, at 11.

Based on the above language, it appears that Congress intended the concept "special circumstances" to be broader under the Equal Access to Justice Act than under the civil rights statutes. While the latter are concerned with

equitable considerations relating to the factual context [26] of a case, the former includes, in addition, equitable considerations relating to the legal position of the government. Accordingly, where the government loses after asserting a novel or creative legal theory that is credible but untested, attorney fees should be opposed and denied under the special circumstances exceptions. [27]

Moreover, if an eligible prevailing party has litigated on behalf of a corporation or entity that is ineligible based on net worth or number of employees, e.g., a trade association, Department attorneys should argue that this attempt to avoid the eligibility limitations of the Act constitutes special circumstances which make an award unjust.

26/ For examples of special circumstances in which courts in civil rights suits have denied successful plaintiffs attorney fees, see Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1045 (4th Cir. 1976) (awarding attorney fees against the retirement fund would penalize innocent participants in the plan); Naprstek v. City of Norwich, 433 F. Supp. 1369, 1370-71 (N.D.N.Y. 1977) (case brought principally as vehicle to generate fee award); Skehan v. Board of Trustees, 436 F. Supp. 657, 667 (M.D. Pa. 1977) (award considered unjust because plaintiff in violation of "clean hands" doctrine); Bacica v. Board of Education, 451 F. Supp. 882, 889 (W.D. Pa. 1978) (court critical of plaintiff's counsel for failing to marshal evidence and make clear presentation of the facts).

27/ Similarly, it would be inappropriate to assess fees against an agency which was not primarily responsible for the formulation of the position held not to be substantially justified. See e.g., The Judicial Review Act 28 U.S.C. 2341 et seq.

VI. DETERMINATION OF THE AMOUNT OF ATTORNEY FEES AND OTHER EXPENSES [28/]

A. Attorney Fees: The Lodestar Concept

Analysis of the amount of attorney fees to be awarded may start with determination of what has been called the "lodestar" or the reasonable number of hours expended on the case multiplied by the reasonable hourly rate at which counsel should be compensated. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) and 540 F.2d 102 (3d Cir. 1976) (en banc). Some circuits use a more complex multifactor analysis. See e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

1. Reasonable Hours. An attorney should only be compensated for productive time which would ordinarily be properly billed to the attorney's client in the exercise of

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28/ While this part necessarily refers to established case law in its discussion of the permissible amount of fee awards, it may be possible to argue that case law developed where the United States is not a party should not be imported wholesale into the new Act. This is because waivers of sovereign immunity must be explicit and unambiguous, and are construed narrowly in favor of the government. This section of the guidelines is meant only as a general discussion of the law on the calculation of attorney fees and other expenses under other statutes. Nothing in this part should be considered by the department attorneys as conceding any issues which may arise in litigation concerning the proper determination of attorney fees under the Act.

billing judgment. Copeland v. Marshall, supra, at 891-92. To determine whether the hours for which compensation is sought were productively spent and whether the counsel exercised billing judgment, counsel should be required to provide either original time logs, Pete v. UMW Welfare & Retirement Fund, 517 F.2d 1275, 1292 (D.C. Cir. 1975) (en banc) or an affidavit which sets forth the specific work performed by number of hours per day for each attorney.

If counsel are entitled to attorney fees because they prevailed on some claims, they should not be compensated for litigating separable claims upon which they did not prevail. Copeland v. Marshall, supra, at 892; Oldham v. Ehrich, 617 F.2d 163 (8th Cir. 1980); Dillon v. AFBIC Devel. Corp., 597 F.2d 556 (5th Cir. 1979); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). Additionally, unreasonable time spent on a portion of the case should not be compensated. Thus, where three attorneys are at a hearing where one is sufficient, compensation for the excess two should be denied. Copeland v. Marshall, supra, at 891. If unproductive, unorganized, or excessive hours were spent on discovery, motions, etc., compensation for the excess hours should be denied. Copeland v. Marshall, supra, at 902-03. If there are multiple parties, attorney fees should be apportioned among the parties to reflect their efforts on the case. Only a reasonable number of hours should be reimbursed and counsel should not be compensated for duplicative work.

Reasonable time spent litigating the fee award itself has been deemed normally to be compensable in many circuits. 29/ Copeland v. Marshall, supra, at 896; Gurule v. Wilson, 635 F.2d 782, 792 (10th Cir. 1980; Bond v. Stanton, 630 F.2d 1231,1233, 1235 (7th Cir. 1980); Johnson v. Mississippi, 606 F. 2d 635, 637-39 (5th Cir. 1979); Gagne v. Maher, 594 F. 2d 336, 334-44 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980); Weisenberger v. Huecker, 593 F. 2d 49, 53-54 (6th Cir.), cert. denied, 444 U.S. 880 (1979); Lund v. Affleck, 587 F. 2d 75 (1st Cir. 1978); Prandini v. National Tea Co., 585 F. 2d 47, 52-53 (3d Cir. 1978).

Consideration should be given to reserving challenges to the reasonableness of fees or the number of hours claimed until after the court reaches a decision on whether the government's case was "substantially justified." By bifurcating the fee proceeding, unnecessary expenditure of time and resources can be avoided.

2. Reasonable Hourly Rate. The hourly rate at which counsel may be compensated under section 2412(d) is

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29/ Attorney fees for time spent in obtaining reimbursement for attorney fees is not recoverable in common fund situations. Copeland v. Marshall, 641 F. 2d 880, 896 n.29 (D.C. Cir. 1980).

limited to $75 per hour by the Act. 30/ However, that does not mean that all counsel automatically are entitled to receive $75 per hour. An attorney is only entitled to receive the rate prevailing in the particular community for similar work. Johnson v. Georgia Highway Express, Inc.; supra at 718. The amount contracted for and paid to the attorney in the particular action or in similar actions is obviously relevant to a determination of the market rate. Hamilton v. Ford Motor Company, 636 F. 2d 745 (D.C. Cir. 1980). To the degree that an attorney does not have an hourly rate which is paid by the majority of the attorney's clients because the attorney is a salaried employee or takes the majority of cases on a contingent basis, the attorney may establish a market rate by demonstrating the amount similar attorneys are paid by their

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30/ A court may award attorney fees in excess of $75 per hour if it determines that an increase in the cost of living or special factor, such as limited availability of qualified attorneys for the proceeding involved, justifies a higher fee. It is highly unlikely that a cost of living increase over $75 per hour could be justified since the Act came into effect October 1, 1981. The circumstances in which a competent counsel cannot be hired at this rate should be extremely rare. The real issue is whether there is a total absence of competent counsel at the rate of $75 per hour. Only in the most esoteric of specialties could it be argued that competent counsel could not be found at or below the ceiling set out in the Act.

clients for similar work. A salaried attorney of a public interest firm or other firms or of a corporate legal department cannot make a claim for the commercial market rate for his services, rather than just the attorney's salary, unless the award will be used only for the organization's legal counsel activities. National Treasury Union Employees v. United States Department of the Treasury, Internal Revenue Service,, No. 78-1085 (D.C. Cir., June 18, 1981); ABA Code of Professional Responsibility, Diciplinary Rule 3.2.

Counsel should not be compensated at the same hourly rate for the different types of services performed. Copeland v. Marshall, supra, at 892. For example, counsel may be compensated at a lower hourly rate for work not performed in court. They should also be compensated at paralegal and clerical hourly rates for performing such functions. Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

Affirmative evidence in the form of local bar publications indicating the hourly rates charged by particular attorneys, affidavits to that effect, office settlement policy hourly rates, etc., are all relevant evidence and should be introduced in establishing the market rate in the particular community.

3. Adjustment to the Lodestar. The lodestar may be adjusted upward or downward by various factors. The burden is on the party proposing the deviation to justify it. Copeland v. Marshall, supra, at 892-94; Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., supra, at 118. Any upward adjustment to the lodestar cannot result in payment at an hourly rate higher than that allowed under the Act, $75 per hour under section 2412(d), unless special factors exist or a cost of living increase is appropriate.

B. Other Expenses

The Act provides for payment of other expenses as well as attorney fees. Section 2412(d)(2)(A) states that other expenses include the reasonable expenses of expert witnesses, the reasonable cost of any study and analysis, etc., found by the court to be necessary for the preparation of the party's case. Attempts to seek as other expenses items which form the normal overhead of a law practice such as rent, supplies, secretarial services, etc., should be opposed.

VII. EFFECT ON PENDING LITIGATION

Section 208 of the Act, 5 U.S.C. 504 note, provides as follows:

> This title and the amendments made by this title shall take effect of [sic] October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date.

Two questions are presented by this provision: (1) At what point in litigation does a case cease to be "pending," and (2) may a prevailing party receive an award for attorney fees and expenses incurred prior to October 1, 1981.

A. Pending Cases

It is well settled that newly enacted statutes which, by their terms, apply to "cases pending" include cases pending on appeal, see, e.g., United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801), and cases pending on a petition for a writ of certiorari, see, e.g., Carpenter v. Wabash R. Co., 309 U.S. 23 (1940). Cf. Bradley v. Richmond School Board, supra, at 711-14. Thus, there appears to be no doubt that the Act applies to cases in all stages of litigation. A case ceases to be pending when all legal appeals are exhausted or where the time in which to appeal has run.

B. Fees and Expenses Incurred Prior to October 1, 1981

1. Sovereign Immunity. A more difficult question is whether a prevailing party may receive fees and expenses incurred prior to October 1, 1981, the effective date of the Act. A waiver of sovereign immunity must be unequivocally expressed, particularly where the resulting federal liability would be substantial. The question is whether the decision of Bradley v. Richmond School Board, supra, and the

rationale for the decision reached in that case, are applicable here, where sovereign immunity considerations are involved.

In Bradley, the Supreme Court held that section 718 of Title VII of the Emergency School Aid Act, which authorized awards of attorney fees, applied to attorneys services rendered before the enactment of the statute where the propriety of the fee award was pending on appeal when the statute became law. However, because the Bradley case did not involve an award of fees against the United States, it can be distinguished from a case arising under the Equal Access to Justice Act. As the Court said in NAACP v. Civiletti, 609 F. 2d 514 (D.C. Cir. 1979), cert. denied, 447 U.S. 922 (1980), "[t]o recover attorneys' fees against the United States, a prevailing party must first surmount a formidable barrier, the doctrine of sovereign immunity."

"It is elementary that [t]he United States, as sovereign, is immune from suit save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Mitchell, 445 U.S. 535, 538 (1980), quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). Under well established precedent, waivers of federal sovereign immunity "cannot be implied but must be unequivocally expressed." United States v. King, 395 U.S. 1, 4 (1969); See also United States v. Testan, 424 U.S. 392

(1976). With respect to awards of attorney fees, the policy against implied waivers of federal sovereign immunity is embodied in 28 U.S.C. 2412, which has been consistently construed as immunizing the United States against attorney fees awards absent clear or express statutory authority to the contrary. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 267-68 (1975); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 643 F. 2d 1034, 1037 (5th Cir. 1981); Aparacor, Inc. v. United States, 571 F. 2d 552, 553 (Ct. Cl. 1978); Fitzgerald v. United States Civil Service Commission, 554 F.2d 1186, 1189 (D.C. Cir. 1977).

Effective October 1, 1981, 28 U.S.C. 2412(a) provides: 31/

> Except as otherwise specifically provided by statute, a judgment for costs as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his or her official capacity, in any court having jurisdiction of such action.... [Emphasis supplied.]

31/ The language of section 2412(a) is virtually identical to 28 U.S.C. 2412 (1976), the provision in effect prior to October 1, 1981.

Thus to determine whether fees incurred prior to October 1, 1981 are covered by the Act, it is necessary to find statutory language specifically waiving sovereign immunity retroactively.

With respect to the newer subsections of section 2412, there is neither specific language nor legislative history indicating Congressional intent that fees generated prior to October 1, 1981 be recoverable. Although there is no doubt that the new section 2412 (read together with Section 208 of the Act, 5 U.S.C. 504 note) contains an explicit waiver of sovereign immunity for the recovery of attorney fees incurred after October 1, 1981, the Act is silent with regard to pre-October 1 fees. Thus, there is no explicit waiver of sovereign immunity allowing such fee awards.

2. The Brookfield Decision. In an analogous situation under the Contract Disputes Act of 1978, 41 U.S.C. 611 et seq., the Court of Claims recently held that a prevailing contractor is not entitled to interest that accrued prior to the effective date of that Act. Brcokfield Construction Co. v. United States, No. 555-79C (Ct. Cl. Sept. 23, 1981). The Contract Disputes Act provides that a contractor may elect to proceed under the Act with respect

to "any claim pending then before the contracting officer or initiated thereafter." 41 U.S.C. 601 note. The Contract Disputes Act also declares that interest runs from the date the contracting officer receives the claim. Brookfield's claims had been received by the contracting officer many years prior to the effective date of that Act. Nevertheless, the court held that pre-act interest would be denied for three reasons: (1) the very large liability that would be imposed on the government, unacknowledged in the legislative history; (2) the objectives and purposes of the Act's interest provision; and (3) the traditional attitude cautioning against implied waivers of sovereign immunity. Slip Op. at 5.

The three-part rationale utilized by the Court of Claims in Brookfield applies with equal force to the award of retroactive attorney fees (i.e., those generated prior to October 1, 1981) under the Act. First, it is certain that the allowance of retroactive attorney fees would impose a large liability on the United States. The Supreme Court has cautioned against "reading a statute to impose liability on the federal government where 'the liability would mount to great sums' unless the words (or intent) are plain." Schellfeffer v. United States, 343 F.2d 936, 942 (Ct. Cl.

1965) citing Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922). See also United States v. Zazove, 334 U.S. 602, 616-17 (1948). Congress, in drafting the Act, expressed a desire to narrow its scope in order to make the costs of the Act acceptable. See H.R. Rep. No. 96-1418, supra, at 14. With this concept in mind, and since no computation could have been available to Congress of the amount of attorney fees incurred prior to the Act's effective date, Congress could hardly be presumed to have intended to impose such unknown and potentially great liability upon the federal government. The cost estimates submitted by the Congressional Budget Office and reprinted in the committee reports predict a substantial federal liability during the first year of the Act's existence. They predict a substantially greater one the following year. Had Congress expected parties to be able to recover pre-Act fees in pending cases, it might conceivably have expected a substantially greater exposure during the first year, when old claims with large accumulated legal fees were being settled, than in the second or subsequent years. While a few legislators in debate remarked on the likely costliness of the bill, no reference was made to cases pending many years, and no cost estimates were tied to any hard figures.

The second element relied on by the Court in Brookfield is that the allowance of pre-Act interest would

not further the purposes of the Contract Disputes Act's interest provision. Similarly, the allowance of pre-Act attorney fees would not serve the purpose or policy behind the Equal Access to Justice Act. The purpose of the Act was articulated by both the Senate and House Judiciary Committees as follows:

> The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.

S. Rep. No. 96-253, supra, at 1; H.R. Rep. No. 96-1418, supra, at 5. Thus, a primary goal in enacting the legislation was to encourage parties to contest unreasonable governmental action. Certainly, awarding retroactive attorney fees would not further this goal. Those individuals and organizations who contested governmental actions prior to October 1, 1981 did not require additional incentives to do so. Moreover, another primary purpose of the Act was to "[curb] excessive regulation and the unreasonable exercise of governmental authority." S. Rep. No. 96-253, supra, at 7; H.R. Rep. No. 96-1418, supra, at 12. This important legislative purpose for allowing attorney fees is not facilitated by awards of pre-Act fees. The notion that fees might be awarded as a result of unreasonable governmental action could not have served as a deterrent in pre-Act days, because no such provision existed.

The third and final principle upon which the Brookfield Court relies is the doctrine of sovereign immunity, discussed above. In light of the precept that "limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied," Soriano v. United States, 352 U.S. 270, 276 (1957), it is the Department's position that the award of attorney fees under sections 2412(b) and (d) should be limited to those generated after the effective date of the Act.

This is especially true under section 2412(d). The imposition of fees under section 2412(d) is described in the legislative history as a "limited experiment," and a sunset provision in §204(b) of the Act ensures that it will be "reviewed and reevaluated at the end of three years." The acknowledgedly experimental and plainly forward-looking purpose served by this subsection was designed to give future encouragement to those who would otherwise be "coerced" by the government because they "do not have the resources to fully litigate the issue," rather than compensate those whose prior willingness to litigate is evidenced by an accumulation of pre-October 1 fee obligations.

Where such a potentially enormous financial liability is involved, the doctrine of sovereign immunity requires that Congress expressly recognize and invite that

liability. In the absence of such an express waiver, none will be assumed.

VIII. SOURCE OF FUNDS TO PAY AWARDS

Awards of costs under 28 U.S.C. 2412(a) will be paid as usual from the GAO judgment fund. Attorney fees awarded pursuant to section 2412(b) are also payable from the judgment fund. However, when an agency is found to have acted in bad faith, the Act expressly provides that the award shall be paid from the agency's appropriation. When section 2412(d) serves as the basis for the award, attorney fees and other expenses may be paid either from the agencies' budgets or from the judgment fund. It should be noted, however, that section 207 of the Act bars payment of section 2412(d) awards from the judgment fund in the absence of a specific advance appropriation. To date, Congress has not enacted appropriations for this purpose. Thus, until Congress enacts such appropriations or modifies section 207, the judgment fund cannot be used to pay fees and an agency's unrestricted appropriation is the sole source of payment for section 2412(d) awards. If an award is made under 2412(d), a certified copy of the judgment should be sent to the client agency and to the appropriate division of the Department of Justice.

Because of the vulnerability of agency appropriations, it is important that client agencies be consulted at every stage of the proceeding and that the merits of the litigating positions be clearly agreed upon.

IX. REPEAL OF RULE 37(f)

Attorneys should pay particular attention to the fact that the Equal Access to Justice Act repeals Rule 37(f) of the Federal Rules of Civil Procedure. Rule 37 authorizes an award of reasonable expenses, including attorney fees, to the prevailing party on a motion to compel discovery unless the court finds that the position of the losing party was "substantially justified or that other circumstances make an award of expenses unjust." Rule 37 also provides for expenses where a party fails to obey a court order regarding discovery and the court determines that such failure was not substantially justified.

Rule 37(f), which is now repealed, has always insulated the United States from paying such expenses for discovery abuse, although some courts have assessed fees against government attorneys personally. From October 1, 1981, forward, the United States may be liable for expenses including attorney fees under Rule 37. Thus, Department of Justice attorneys should take responsibility for informing agency attorneys that failure to supply answers to interrogatories or documents or to submit to other discovery could result in a Rule 37 judgment against the client agency.

LEGISLATIVE HISTORY

OF THE

EQUAL ACCESS TO JUSTICE ACT

THE ACT

Equal Access to Justice Act, Pub. L. No. 96-481, Title II, 94 Stat. 2321, 2325; enacted on October 21, 1980, by the 96th Congress, Second Session; effective October 1, 1981.

1. H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. ordered to be printed by the Committee of Conference on September 30, 1980, to accompany H.R. 5612.

2. S. Rep. No. 96-253, 96th Cong., 1st Sess. ordered to be printed by the Senate Committee on the Judiciary on July 20, 1979, to accompany S. 265.

3. H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. ordered to be printed by the House Committee on the Judiciary on September 26, 1980, to accompany S. 265.

4. H.R. Rep. No. 96-1005, pt. I, 96th Cong., 2d Sess. ordered to be printed by the House Committee on Small Business on May 16, 1980, to accompany H.R. 6429.

5. Senate Hearings before the Committee on the Judiciary, 96th Cong., 1st Sess., February 13 and 27, 1979.

6. Senate Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, 96th Cong., 1st Sess., April 19, 20 and 21, 1979 (on S. 265).

7. House Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, 96th Cong., 2d Sess., May 20 and June 24, 1980 (on S. 265).

8. House Hearings before the Subcommittee on SBA and SBIC Authority and General Small Business Problems of the Committee on Small Business, 96th Cong., 2d Sess., April 17, 23 and May 1, 1980 (on H.R. 5103 and H.R. 6429).

9. S886-S892 (daily ed. January 31, 1979); Remarks by Senator Domenici upon introduction of S. 265.

10. S10911-S10926 (daily ed. July 31, 1979); Senate consideration, amendment, and passage of S. 265.

11. S.13685-S13691 (daily ed. September 26, 1980); Senate consideration and passage of H.R. 5612 with amendment that incorporated the basic provisions of S. 265 as reported to the House.

12. H9832 (daily ed. September 29, 1980); House disagreement with the Senate amendment to H.R. 5612 and agreement to a conference with the Senate.

13. H10001-H10002 (daily ed. September 30, 1980); Comment by Representative Kastenmeier on H.R. 5612 and S. 265.

14. H10013 (daily ed. September 30, 1980); Comment by Representative Boner on H.R. 5612 and S. 265.

15. E4642 (daily ed. September 30, 1980); Remarks by Representative Udall in support of S. 265.

16. H9993-H10001 (daily ed. September 30, 1980); Committee of Conference report on H.R. 5612 filed.

17. S13873-S13876 (daily ed. September 30, 1980); Senate consideration and approval of the Committee of Conference report on H.R. 5612.

18. S14089 (daily ed. September 30, 1980); Senate consideration and passage of S. Con. Res. 134 to authorize the corrections in the enrollment of H.R. 5612.

19. S14089-S14091 (daily ed. September 30, 1980); Senate introduction, consideration and passage of S. 3186 (identical to S. 265).

20. H10213-H10231 (daily ed. October 1, 1980); House consideration, amendment and passage of H.R. 5612.

21. S14210-S14215 (daily ed. October 1, 1980); Senate consideration and passage of H.R. 5612 as amended by the House.

22. H588 (daily ed. February 5, 1980); Remarks by Representative McDade upon the introduction of H.R. 6429.

23. 16 Weekly Compilation of Presidential Documents 2381-2382 (October 27, 1980); Statement of the President on October 21, 1980, upon signing into law H.R. 5612.

TITLE II—EQUAL ACCESS TO JUSTICE ACT

Equal Access to Justice Act.

SEC. 201. This title may be cited as the "Equal Access to Justice Act". 5 USC 504 note.

FINDINGS AND PURPOSE

SEC. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings. 5 USC 504 note.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

SEC. 203. (a)(1) Subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 504. Costs and fees of parties 5 USC 504.

"(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

"(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. Application for fees and expenses, submittal.

"(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor.

"(b)(1) For the purposes of this section— Definitions.

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

5 USC 551.

"(B) 'party' means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, or public or private organization other than an agency, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, and (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;

26 USC 501.

"(C) 'adversary adjudication' means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and

5 USC 554.

"(D) 'adjudicative officer' means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

"(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

Applications, uniform procedures.

"(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

Fee determination, review.

"(2) A party dissatisfied with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

"(d)(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

"(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years. Appropriation authorization.

"(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.". Report to Congress.

(2) The table of sections of subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new item:

"504. Costs and fees of parties.".

(b) Section 202 of the Act entitled "An Act to amend the Small Business Act and Small Business Investment Act of 1958 to provide additional assistance under such Acts, to create a pollution control financing program for small business, and for other purposes" approved June 4, 1976 (15 U.S.C. 634b), is amended—

(1) by striking out "and" after the semicolon in paragraph (9);

(2) by striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following new paragraph:

"(11) advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States with respect to section 504(e) of title 5 of the United States Code.". *Ante*, p. 2325.

(c) Effective October 1, 1984, section 504, and the item relating to section 504 in the table of sections, of title 5, United States Code, as added by subsection (a) of this section, are repealed, except that the provisions of such section shall continue to apply through final disposition of any adversary adjudication as defined in subsection (b)(1)(C) of such section, initiated before the date of repeal. Repeal. 5 USC 504.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN JUDICIAL PROCEEDINGS

SEC. 204. (a) Section 2412 of title 28, United States Code, is amended to read as follows:

"§ 2412. Costs and fees

"(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States 28 USC 1920.

shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

"(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Judgment payments.

"(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

28 USC 2414, 2517.

"(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Fee and expense applications, submittal.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

Awards, reduction or denial.

"(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

Definitions.

"(2) For the purposes of this subsection—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the

highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

Ante, p. 2325.
41 USC 601 note.

"(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

28 USC 2414, 2517.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

Appropriation authorization.

"(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.".

Report to Congress.
28 USC 604.

(b) The item relating to section 2412 in the table of sections for chapter 161 of title 28, United States Code, is amended to read as follows:

"2412. Costs and fees.".

(c) Effective October 1, 1984, subsection (d) of section 2412, as added by subsection (a) of this section, is repealed, except that the provisions of that subsection shall continue to apply through final disposition of any action commenced before the date of repeal.

28 USC 2412.

TECHNICAL AND CONFORMING AMENDMENTS

Repeal.
28 USC app.

SEC. 205. (a) Subdivision (f) of rule 37 of the Federal Rules of Civil Procedure is repealed.

(b) The table of rules of the Federal Rules of Civil Procedure is amended by deleting the item relating to subdivision (f) of rule 37.

(c) Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by striking out "or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code,".

26 USC 1.

EFFECT ON OTHER LAWS

28 USC 2412 note.
Ante, p. 2327.

SEC. 206. Nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.

LIMITATION

5 USC 504 note.

SEC. 207. The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts.

EFFECTIVE DATE AND APPLICATION

5 USC 504 note.

SEC. 208. This title and the amendments made by this title shall take effect of October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date.

Ante, p. 2325.

Senator GRASSLEY. I now call our next witnesses to the table. Mr. Charles Cadwell, representatives of the Administrative Conference, and Mr. John Higgins, Deputy General Counsel of the NLRB.

If any of you have counsel or any colleagues you wish to bring with you, feel free to do that.

It is my understanding that Mr. Babcock is here from the Administrative Conference.

Mr. BABCOCK. That is correct, Senator.

Senator GRASSLEY. All right. Now, I would also suggest to you that if Senator Domenici does come in to testify, I will have to ask you to just stop, as he has a meeting, at 11, of the Budget Committee.

Mr. John Higgins serves as Deputy General Counsel for the NLRB. The NLRB has experienced about half the activity under the Equal Access to Justice Act since the inception of the legislation. Mr. Higgins will offer his views on how the act has affected the NLRB in its proceedings.

Since Mr. Smith, Chairman of the Administrative Conference, is ill, we have Stephen Babcock, who is Executive Director of the Administrative Conference, and Ms. Fowler, the Staff Director. Thank you for substituting for him, and tell him thank you from me for his accepting our invitation for his agency.

Mr. Cadwell is Director of Interagency Affairs for the Small Business Administration.

I want to thank all of you for your participation, and we will now proceed.

Mr. Cadwell, will you start out?

Mr. CADWELL. Certainly, I would be glad to.

STATEMENTS OF CHARLES CADWELL, DIRECTOR, OFFICE OF INTERAGENCY AFFAIRS, U.S. SMALL BUSINESS ADMINISTRATION; STEPHEN L. BABCOCK, EXECUTIVE DIRECTOR, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY MARY CANDACE FOWLER, STAFF ATTORNEY; AND JOHN HIGGINS, DEPUTY GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, ACCOMPANIED BY BURTON SUBRIN, ACTING SOLICITOR, AND STUART WEISBERG, ATTORNEY

Mr. CADWELL. Thank you, Mr. Chairman. We appreciate the opportunity to be here this morning to provide the subcommittee with information on the Equal Access to Justice Act.

As you know, there are several ways to reform and change Federal regulations. The Regulatory Flexibility Act, which is the statute that our office is charged with monitoring, requires agencies to analyze small business impacts of proposed rules and explain that impact in a public way. This focuses on changing the way rules are promulgated.

In order to modify the way rules are enforced, Congress passed the Equal Access to Justice Act. By awarding fees, the Equal Access to Justice Act expands the liability of the Federal Government in order to equalize the litigating power of small entities.

The act seeks to enforce greater accountability on those who bring to bear the power and resources of the Federal Government.

As the act is evaluated and as amendments are proposed, they should be viewed in light of this basic goal.

This act will expire on October 1, 1984, as you noted, and thus, we welcome your ongoing attention. We believe that at this early stage, there are few reliable measures of the act's efficacy. There are several reasons for this.

First, there have been few cases in which the successful litigant has sought to recover attorneys' fees. As the Administrative Conference of the United States and the Administrative Office of the U.S. Courts will report, there have been fewer than 100 decisions with respect to claims for attorneys' fees, and in less than 25 of those have been actual awards. Small business understanding of new statutory provisions such as this always, takes time for those small firms to learn of the act's existence, understand its provisions and relevance to them, and then to pursue actual claims.

The second measure of the act's usefulness may be the level of complaints about agency enforcement actions. If the number of complaints is lower, it could very well reflect the caution that agencies are using to insure that their actions are substantially justified. Parenthetically, I should note that a very small number of the calls to our office's new toll-free answer desk for small businesses relate to agency enforcement actions.

OBSERVATIONS ON EFFECTIVENESS OF ACT

While it may be difficult to measure the impact, there are a few observations I think we can make. First, the act is resulting in the award of fees where courts or agencies are determining that Government actions were not substantially justified. And while the courts are certainly not uniform in their interpretations of some of the key provisions of the act, small businesses have recovered fees. This, we think, is a positive sign.

The act is not living up to the fears of its opponents. We have not seen thousands of claims for millions of dollars. The courts and the agencies are not clogged with frivolous claims for attorneys' fees. I understand that the typical award by a court is under $5,000, and, that in this first year, the total awards granted were less than $1 million.

In our role as a small business advocate, we have taken several actions to assist in implementing this statute. As the Justice Department developed its rules for implementation of the EAJA, we engaged in detailed discussions with the staff. We have also commented directly to several other agencies as they have promulgated their own rules. In addition, we have distributed to small businesses and small business trade associations about 10,000 copies of our brochure describing the act. I would like to point out that there is additional value to having these hearings this morning, and that is as a forum for discussion of the issues faced by the 12 States that have enacted their own Equal Access to Justice Acts, and the approximately one dozen others that have legislation pending.

As enforcement authority for Federal regulatory schemes has shifted to the States, or as contracting activity has evolved through the use of block grants, it is important that State officials face similar constraints on unjustified actions against small businesses, as

do Federal officials. Many of the States that have passed equal access laws have patterned them after the Federal statute. Since many of the arguments that were raised against State bills are the same or similar to those that were raised in objection to the Federal law, both this hearing and the reports of the Administrative Conference and the Administrative Office of the Courts are going to be important tools for putting these objections into a more realistic perspective.

In summary, Mr. Chairman, this act is an important part of a broader effort to make Government agencies more accountable for their actions. It is a law that the small business community needs to know about and learn how to use, and we intend to continue to be a part of that effort.

Thank you.

Senator GRASSLEY. Mr. Babcock?

Mr. BABCOCK. Thank you very much, Mr. Chairman.

It is a pleasure to be here before you today. With me is staff attorney Mary Candace Fowler, who has done a considerable amount of work on the act for the Office of the Chairman of the Administrative Conference.

Our Chairman, Loren A. Smith, is, as you indicated earlier, quite ill and unable to attend. He sends his respects and his regards. He and I both enjoyed our visit with you prior to his confirmation, and he had looked forward to being here today to appear before you. However, we hope he will be up and about again in a week or two.

We have brought with us today our testimony, which I hope can be admitted into the record, and I certainly will not read it all, and our annual report to the Congress, which we are releasing here today, and an article, a reprint from a "Tulane Law Review" article, which people may be interested in, coauthored by Candy Fowler and the former Chairman of the Administrative Conference. It describes our activities under the act, and may be of interest to students and others who are concerned with this area of the law.

Senator GRASSLEY. Without objection, the testimony will be included.

Mr. BABCOCK. Thank you, Mr. Chairman.

BREAKDOWN OF CASE COUNT

In our annual report, you will see that there have been 103 applications for fees to administrative agencies during the past year. Thirty-one were denied or dismissed; 72 remain pending at the end of the year. And for our purposes, I might say, the end of the reporting year is September 30.

Only three cases advanced so far as to receive a recommendation for an award from an administrative law judge. Of these, one was denied by the agency on the ground that the application had come in a day or two beyond the 30-day limit, and the other two remain pending. One of those is before the National Transportation Safety Board, the other is before the NLRB, and both are described in our annual report.

The key issue under the act, the question that people keep asking us, is why have there been so few awards, and to anticipate

that question, may I say we really do not know. There are a number of possibilities. We have discussed these in our prepared statement. We remain very interested to see whether the number of applications begins to increase as more attorneys and clients become aware of the act.

We were asked in preparing our testimony to deal with subjects that you might want to consider, your subcommittee might want to consider, if and when you propose amendments to the act. In our testimony, we talk about the "position of the United States" issue, which the Justice Department representative already discussed; the question of whether awards for fees incurred prior to October 1, 1981, is another key issue. The source-of-payments provision, although that has not created a problem as yet, is somewhat murky in the legislation. There is a question which has arisen as to whether contract appeals boards, and nonarticle III courts such as the bankruptcy courts, can make awards. That is something you might want to consider. Then, there is the question of whether or not applications for net worth can receive confidential treatment or must be disclosed to the public.

Also, there is the 30-day rule. As you know, the courts and agencies have generally held that the 30-day rule on filing an application is jurisdictional, and a court or an agency cannot extend that period, even for good cause. You might want to consider whether or not that should be amended.

Finally, there is the extremely technical problem that the definition of an eligible party on the court side speaks of either less than $5 million in assets for a corporation, or 500 or fewer employees. It is fairly clear, I believe, that Congress intended both definitions to read as the definition on the agency side reads, which is that an eligible party is one who has both $5 million or less in net assets and 500 or fewer employees.

The Office of the Chairman was quite pleased to have been chosen to undertake the activities it has given in implementing the act. We did not ask for this task. In fact, we were somewhat surprised when we heard that we had been written into the bill. I think it was thought on the House side that the act's implementation would benefit from policy-neutral, scholarly advice. We hope that we have satisfied Congress expectations, and we welcome assignments of this kind.

I have nothing further to add. We will be pleased to answer any questions you may have.

Senator GRASSLEY. Thank you.

Mr. Higgins, would you introduce your associates, please?

Mr. HIGGINS. Yes, I will, Senator. On my right are the Board's Acting Solicitor, Mr. Burton Subrin, and Supervisory Attorney, Stuart Weisberg, a member of General Counsel's staff.

I am pleased to be here this morning to testify before you concerning the experience of the National Labor Relations Board in its first year under the Equal Access to Justice Act.

The Board and the General Counsel have traditionally refrained from testifying concerning the wisdom of particular pieces of proposed or actual legislation, leaving those judgments where they properly belong, to the administration and to the Congress. My testimony today will be in that tradition.

As has been noted earlier, the NLRB has received a fairly substantial number of applications under the Equal Access to Justice Act. During the first year, we received 49. Those applications were disposed of in the following manner: 17 were denied; 2 applications have been stayed, pending proceedings before courts of appeals, leaving approximately 30 applications pending before the agency on September 30, 1982.

We anticipated that we would have a fairly substantial amount of activity under the act, because of the agency's caseload and the number of employers and unions involved in Board cases who meet the act's eligibility requirements.

Senator GRASSLEY. Mr. Higgins, Senator Domenici just stepped in, so would you just pause there?

Mr. HIGGINS. No problem.

Senator GRASSLEY. It is my pleasure to welcome you, Senator Domenici.

We appreciate your leadership in this area. I applaud you for the work you have done in this area over the years, and we would at this point welcome your testimony.

STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator DOMENICI. Thank you very much, Mr. Chairman. I will not take too much of your time.

I commend you for the hearing, and I thank the members of the subcommittee for the review of Public Law 96-481. As you indicated, this has been a long haul. Five years ago, I initially introduced this legislation. There is no need to review the legislative history. Suffice it to reiterate that this legislation was an attempt to deal with capricious and arbitrary governmental regulations by allowing those affected to vindicate their rights and to do so at less financial cost than had prevailed before.

Stories were rampant of minor-type violations, minor-type costs assessed, that were really part of a bureaucratic policy. Thus it was really impossible for a constituent to fight for his rights because, for a $50 fine imposed, it would cost $1,500 to win a case, and that was just a simple example. It was hoped that this law would not end up costing the Government a lot of money, but to the contrary, would cause those who impose the interpretation of the Government to be a little bit more concerned that they might find themselves in litigation and might lose, and that it might cost their agencies some money. That was the hope.

It represented a significant plateau in the development of administrative law, which had gone through at least three stages of development. We have now entered the age of pervasive Federal regulation, with a growing tendency of escalating legal and related costs of defending against capricious acts of the Government. We are faced with the question, first asked a long time ago, in 1916, and it is about as good a quote as I can find, from the President of the American Bar, Elihu Root, who said:

> Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights

and obstacles to wrongdoing which, under our new social and industrial conditions, cannot be practically accomplished by simple procedure of legislature in courts, as in the last generation.

I think we saw from that point forward how accurate that statement by the then president of the bar was. At the same time, he said, "If we are to continue a government of limited power, these agencies must themselves be regulated * * *. The rights of citizens against them must be made plain."

Who will regulate the regulators? Equal access was meant to allow the individuals to protect their rights and thus regulate the regulators, in a sense. It was thought to be a different approach than oversight, a different approach than more specific delegation. It was kind of self-policing. The more citizens were pushed by this, the more they would police themselves.

The spirit of the average American who feels wronged is a stronger force than any form of regulatory oversight we can create in a governmental entity. In a sense, we install a sense that you can fight city hall and win. That was basically the notion that was pervasive as this was thought through.

It is in this perspective that I analyzed the 1-year record of the law. While the number of cases in which awards were made is small, I never envisioned it would be otherwise, although we heard all kinds of ominous stories as to how many there would be. While the Justice Department was predicting an annual cost of $600 million, I think my testimony was that I thought it would be more in the neighborhood of $10 million annually. I am convinced they are wrong. I am not sure that $10 million is right. But I remain convinced that they are wrong.

The major purpose was to reduce the number of conflicts between citizens and their Government. Having seen interoffice memos from three agencies advising their legal departments to be extra cautious in the cases they decide to litigate because of equal access, I feel that that is beginning to work. I think that is precisely what we hoped would happen. And I hope that I did not see all of them. I hope they exist in many, many agencies where the legal department is reminded of the equal access provision, and caution is urged.

I do feel that the original, Senate-passed version, passed 94–3, would be a stronger and better law. The major deficiency is the source of funding and the timeliness of payment for those who prevail. In the Senate version payment would have come from the budget of the agency which originally initiated the action, and we envisioned payment within 90 days. As the law now stands, even if the individual is successful, payment is uncertain, not forthcoming automatically or immediately. In fact, it might be all rather uncertain.

This, I feel, is the reason why more cases are not brought under this act, and I would say, Mr. Chairman, that I do intend to introduce legislation next year to extend this act. I do hope early hearings are called for and that we proceed to reenact for a substantial period of time equal access, with the changes that the first short period of its history dictates are commonsense, and I hope you will remain involved and commend you for the hearing.

Senator GRASSLEY. Your figure of $10 million may be accurate. At least for this year, it has not reached that point. I do not know what the future holds.

I obviously want to thank you for your participation in the act, commend you, and just simply say I look forward to working with you next year, because I supported the legislation as a Member of the House of Representatives, and I feel it is working well. Of course, a hearing like this is to find out how it can be improved, and things like that, but I would look forward to working with you, as well.

Thank you very much.

Senator DOMENICI. Thank you very much, Mr. Chairman, and I thank all of you for deferring.

[The prepared statement of Senator Domenici follows:]

PREPARED STATEMENT OF SENATOR PETE V. DOMENICI

Mr. Chairman, I thank you and the members of your subcommittee for the opportunity to review and reflect with you on P.L. 96-481, Equal Access to Justice.

Five years after I initially introduced this legislation we are here to analyse the results wrought in its first year of applicability. There is no need to review the entire legislative history of this act for this committee. Suffice it to reiterate that this legislation was an attempt to deal with capricious and arbitrary governmental regulations by allowing those affected individuals to vindicate their rights at no financial cost if they prevailed. It represented a significant plateau in the development of administrative law which had gone through three initial stages of development. We had now entered the age of pervasive federal regulation with a growing tendency of escalating legal and related costs in defending against the expanding regulatory capacity of the Federal Government. Now we were faced by the question first asked in 1916 by Elihu Root, President of the American Bar Association.

". . . Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." 41 A.B. A.R. 335, 368, 369 (1916)

At the same time he uttered important words of caution:

"If we are to continue a government of limited power, these agencies of regulation must themselves be regulated . . . The rights of the citizen against them must be made plain.

Who will regulate the regulators? Equal Access was meant to allow individuals to protect their rights and thus regulate the regulators. The fighting spirit of the average American who feels wronged is a stronger force than any form of regulatory oversight we can create in a governmental entity. In a sense, we instill a sense that you can "fight city hall" and win.

It is in this perspective that I analyse the one year record of P.L. 96-481. While the number of cases in which awards for attorney fees may be small, I never envisioned it would be otherwise. While the Justice Department was predicting an annual cost of $600 million, I estimated that $10 million annually in awards would be reasonable. The major purpose of the act was to reduce the number of conflicts between citizens and their government. Having seen interoffice memos from three agencies advising their legal departments to be extra cautious in the cases they decide to litigate because of Equal Access, I feel it has been successful in its intent.

However, I do feel that the original Senate passed version, which passed 94-3, would be a stronger and better law. The major deficiency is the source of funding and the timeliness of payment for those who prevail. In the Senate version, payment would have come from the budget of the agency which originally initiated the action and we envisioned payment within 90 days. As the law now stands, even if the individual is successful, payment is uncertain. This I feel is a reason why more cases are not brought under Equal Access.

Mr. Chairman, I intend to introduce legislation early in the 98th Congress to extend the Equal Access to Justice Act. The only changes I will make would be to comport it as closely to the intent of the original Senate version, S. 265, as passed by

the Judiciary Committee in the 95th Congress. I hope your committee will share my views and act on it as quickly as possible.

Senator GRASSLEY. Mr. Higgins, why don't you just back up and start over, if you would. I know you were just getting started.

Mr. HIGGINS. I was describing that we understand that we have had substantially more activity under the act than most other administrative agencies. We anticipated that we would have a fairly substantial number of applications, not because we were taking substantially unjustified actions, but because of the large number of cases that come before the agency in the course of a year, and the fact that so many employers and unions that deal with us meet the act's eligibility requirements.

Like all Government agencies, we developed a system of regulations for processing these applications. But in addition to that, we conducted a very careful review of our case-handling procedures and policies for the investigation and the prosecution of cases.

The Board and the General Counsel have, as you know, a very fine system for assuring that matters coming before the agency are handled expeditiously and carefully. We are satisfied that those procedures continue to remain as strong a safeguard against unwarranted prosecutions as is capable of being devised.

I describe more fully in my written testimony some of the 17 applications that were disposed of by the agency this fiscal year. I think those dispositions are a good indication that the agency's traditional safeguards are working.

Those safeguards are also reflected in the overall litigation record of the agency. The General Counsel, the agency's chief prosecutor, wins in whole or in part, over 80 percent of the cases that he brings before administrative law judges and the Board. And when it becomes necessary to go before the courts of appeals, our litigation last year was 78 percent wins, in whole or in part.

This record is particularly significant when you realize that most of the cases that were processed this year before the agency were initiated at a time when the regional director involved and the person who issued the complaint was probably not even aware of the existence of the Equal Access to Justice Act. That is, most of the case began substantially before 1981.

IMPACT OF ACT

The most substantial impact that the NLRB has experienced thus far with respect to the Act does not, however, relate to the payment of claims. Rather, it was the requirement that we devote a substantial amount of staff time to handling claims. Given the substantial staff and budget constraints we faced in fiscal 1982 and that we expect to face in fiscal 1983, the act has had a negative impact on the agency's mission, in the sense that it has necessitated an expenditure of resources that could otherwise have been utilized in handling NLRB matters at a time when we could least afford it. This diversion of staff time began well before October 1, with a review of agency procedures and guidelines and the preparation of regulations.

We believe that this preparation time, while extremely expensive—we estimate it at over $135,000—nonetheless was necessary

to assure that we were ready to deal with the problems that might arise during the first year of the act. All told, during the first full year of the act, we estimate that the costs directly attributable to the act were approximately $140,000 in addition to that $135,000 that was spent prior to October 1. The first full year, in other words, cost the NLRB about $275,000.

Turning to some of the more substantive issues, my written remarks that have been received describe some of the cases that the Board has dealt with this year. One of the areas, of some significance is that involving cases coming before the agency presenting credibility problems. Many NLRB cases rise or fall on an assessment of who is telling the truth. Our regional office staffs make a great effort to resolve those credibility issues, but there are some cases in which they are not able to do so, and so the matter is presented to an administrative law judge in an adjudicatory hearing.

At the hearing, the witnesses testify under oath and on the record, and they are subject to direct and cross-examination An administrative law judge has the opportunity to observe the demeanor of the witness and thus assess the truth of the witness' testimony.

BULWARK OF SYSTEM

This examination and cross-examination is, of course, the bulwark of the entire system of jurisprudence. During the course of this past year, a number of fee applications were disposed of by administrative law judges, who determined that the General Counsel was substantially justified in issuing the unfair labor practice complaint because of the credibility issues involved. The overwhelming majority of the administrative law judges' decisions in this area have not even been appealed to the Board by the applicant.

Our experience under the act is not limited to processing of claims through the administrative process. There have been two cases cited by courts of appeals during the first year of the act. In the first case, a sixth circuit decision called *Wyandotte Savings*, involved an application for fees incurred in connection with the enforcement of the case in the court of appeals. The Board had decided the case before October 1, but the enforcement proceedings in the court of appeals took place thereafter. In those enforcement proceedings, the sixth circuit denied enforcement of the Board's order on the grounds that the Board's order conflicted with prior sixth circuit precedent. But the court sustained the Board with respect to the application of fees, holding that the mere fact that the Board was the losing party did not necessarily mean that the Board was not substantially justified in bringing the action in the sixth circuit.

You mentioned a moment ago, Senator, *Tyler Business Services*. That is an NLRB case decided by the fourth circuit just a few weeks ago. That decision is under study, and as yet, no determination has been made whether any additional action is warranted with respect to that case. It is, however, the first case either before the Board or the courts of appeals in which the NLRB has been unsuccessful in establishing that its actions were substantially justified.

Looking ahead, it is difficult for us to estimate what is going to happen in the next 2 years of the experiment. I do think, however, that the agency will have to continue to expend a substantial amount of time and money in the processing of applications, and will have to do so in the face of other fiscal and staff constraints. This diversion of staff time will have an effect on our ability to handle our traditional workload in the same way we have done in the past.

On behalf of the Board and General Counsel, I do appreciate this opportunity to provide you with this status report of our first year.

Thank you.

Senator GRASSLEY. Thank you.

Before I ask questions, I want to thank Mr. Babcock for submitting his report to the Subcommittee on Agency Administration, in light of the fact that there was some question whether it might be submitted. But thank you very much for doing that.

Mr. BABCOCK. You are quite welcome, Senator.

Senator GRASSLEY. Mr. Higgins, recognizing your reluctance to make specific suggestions regarding areas which need clarification, can you tell us which areas have been most confusing to the Board, and is there a need for legislative clarification in those areas?

Mr. HIGGINS. Well, without characterizing whether there is a need for clarification, I think the most difficult areas, as I think is usual with most legislation, are those initial decisions with respect to the effective date of the act, the retroactivity, and the 30-day jurisdictional issue. In addition, there are the questions of assessing what is the size of the corporate applicant, and of examining whether the corporate applicant is affiliated with a larger organization or with a series of smaller organizations, thus bringing the applicant outside the act's jurisdictional standards.

Senator GRASSLEY. Thank you, Mr Higgins.

Mr. Babcock, as your testimony indicated, there have been conflicting decisions relating to the term, "substantially justified." Do you have any suggestions for legislative language which could correct that problem, or those problems?

Mr. BABCOCK. Not offhand, Senator. I think our testimony was more directed to the "position of the United States" question than to "substantially justified." By and large, to my knowledge—and this is not part of our official responsibilities, but just in looking at court cases—most courts have done what I think fairly reflects the legislative history and have used the standard, "reasonable in fact and law," although not always in those terms. I am not aware of any decisions that seem completely wrong—well, a few, but you get that in any situation—there are some few that are kind of off the wall, to put it bluntly.

Senator GRASSLEY. Thank you. Do you have any opinion on why tax cases should be treated differently than other cases under the Equal Access to Justice Act? Now, let me suggest there that last year's Tax Act suggested a different standard of unreasonableness on the IRS as a tougher standard for that agency.

Mr. BABCOCK. The question, Senator, is do we think there is any justification for adopting a different standard for tax cases?

Senator GRASSLEY. Yes.

Mr. BABCOCK. Well, you are asking something that ultimately is outside the scope of our agency mandate and authority. That is for Congress to decide. But I personally know of nothing that demands a different treatment for tax cases, and certainly, in the tax cases that do fall within the act now, which are those heard by district courts throughout the United States, I am not aware of any particular problem with the present definition.

I am aware of the legislation you speak of. It was in the—what was it—the Tax Reconciliation Act?

Senator GRASSLEY. It is the Tax Act that we passed in August of 1982.

Mr. BABCOCK. Yes, sir, I have seen that language, but I have not examined it carefully. I remember thinking at the time I read it that I was not sure that their different definition would make that much of a difference in most cases.

Senator GRASSLEY. As you indicated in your remarks, there is also confusion regarding the power of contract appeal boards and article I courts to award attorneys' fees under the act. Do you feel legislative language is necessary to clarify this area, and should those bodies be allowed to award fees?

Mr. BABCOCK. Well, the first part of your question is should legislation clarify the question, and I would say yes. I do not know whether that is of sufficient importance to this body to warrant introduction of a bill for that purpose alone, but it seems reasonable, more reasonable from the legislative history to suspect that Congress did not intend those bodies to be included under the act, and yet many of them have argued that they should be included. And so this subcommittee, if it thinks they should be—well, whether it thinks that they should or should not, I would say that that is an issue that ought to be straightened out, because it is engendering considerable confusion and litigation that may be unnecessary.

Senator GRASSLEY. Are you aware of any agencies that have been ordered to pay awards that have not paid what they were supposed to have paid?

Mr. BABCOCK. No, sir, I am not.

Senator GRASSLEY. Has the Administrative Conference any opinion, or have you examined the administration's proposals to limit attorneys' fees?

Mr. BABCOCK. The only thing we have seen of that, Senator, is what we have read in the Legal Times of Washington. I would prefer to see a bill, and have time for my staff to examine it, before I commented on it. We have not seen anything official; just news reports.

Senator GRASSLEY. Well, if you have any studied views, and you wish to submit them in writing, you may do that.

Mr. BABCOCK. I would prefer to see actual language first, is what I am saying, Senator. We have not seen any such proposals. We have heard of them in the media, and that is all.

Senator GRASSLEY. Well, then, my last question deals with the fact that some agencies have not issued final regulations, even though your Conference published some model rules relating to uniform procedures for making awards. You did that on June 25, 1981. These agencies include the Federal Labor Relations Authority, Treasury, the NRC, NASA, Health and Human Services, Com-

merce, SBA, and Merit Systems Protection Board. In that the act mandates the establishment of uniform procedures, do you have an idea as to why there has been a delay? And it is my understanding that the lack of these rules contributes to confusion of the litigation.

Is our information correct?

Mr. BABCOCK. Yes, it is, Senator. Let me add that in most cases, most of those agencies whose names you read, are operating under interim rules, and so they do have something in place. And I think one reason that many of them have not expedited the procedure of making their interim rules final is that there have been so few applications. As the gentleman from the Labor Board mentioned, they have received 49 out of the 103, and the others have come before a handful of agencies.

There are three departments, to my knowledge, that have not even proposed rules—HUD, Interior, and Education—and I am not certain as to why they have not. I have heard that there has been some problem in getting clearance through OMB, with a couple of those departments.

Senator GRASSLEY. Would I be wrong in my analysis that their lack of issuing final regs, in the case of these three agencies, even preliminary ones, is contributing to some confusion in litigation—that was my understanding.

Mr. BABCOCK. We are aware of problems at the Department of Interior for that reason. We are not aware of problems at the other two agencies. Remember that some of these agencies, even those that have gone through with final rules, have very few covered proceedings. As the gentleman from the NLRB also mentioned, of the 14,000 covered proceedings that were decided by agencies during the reporting year, the NLRB had half; a handful of other agencies had the bulk of the remainder—OSHRC, FMSHRC, DOT. Then you get down to agencies like Interior, and there are really very few covered proceedings, much less applications.

OSHRC is the Occupational Safety and Health Review Commission, and they hear the cases brought by the Department of Labor's OSHA, or Occupational Safety and Health Administration. It is a separate commission that hears those cases, and that is all it does. And FMSHRC similarly hears mine safety cases brought by another part of the Department of Labor.

Senator GRASSLEY. Mr. Cadwell, you indicated in your statement that the SBA urged the Department of Justice to modify their model rules with respect to burden of proof and documentation requirements. Can you elaborate on that, and did the Department act in accordance with your suggestion, and did any other agencies follow your advice?

Mr. CADWELL. We did discuss with the Department officials the language contained in their model rule, which described the burden of proof on substantial justification. It was more a question of not using some of the same language that the Administrative Conference used in their model rules. It is our understanding that most agencies that have adopted rules have followed the Administrative Conference model, although Mr. Babcock may have a better idea on that.

Mr. BABCOCK. That is correct.

Senator GRASSLEY. Does the SBA have a position on the funding question previously raised? That is, should an award be paid directly out of an agency's budget or through the general budget fund?

Mr. CADWELL. Mr. Chairman, I am not an expert in how the Government pays its bills. I think our approach to all of these questions is, if the problem is resolved in such a way that it brings the pressure to bear on the administrative person who is bringing an unsubstantially justified action against a small business, then that is something to be preferred, and on the question of funding it seems to me that the more that directly comes out of an agency's funds the more likely they are to institute those procedures that will clean up the enforcement procedures that they use.

Senator GRASSLEY. Senator Domenici alluded to that being his desire. I suppose it was in the original bill that he introduced. I think that there is a feeling on our part in this branch of Government that if it could come out of the general operating budget of the agency, that the agency would be somewhat more cautious in the application of its policy. It stems from the feeling that each agency looks at whatever money they obtain as "our money," and that if it comes out of that budget, it will be a little more disciplined. That is a theory. I do not know how that works in practice.

Yes, sir.

Mr. BABCOCK. Mr. Chairman, speaking as our agency's budget, financial, and accounting and certifying officer, I think that what you say is an understatement. An agency protects its own funds to the best of its ability, with great diligence.

Senator GRASSLEY. Mr. Higgins, did I touch a nerve?

Mr. HIGGINS. I can certainly agree with Mr. Babcock on that. But I think it is important to note that there are agencies like the NLRB that are highly labor-intensive agencies. There are not funds—very few funds—at the NLRB other than the salaries and expenses of agents and attorneys prosecuting cases. A mistake by an agency is regrettable, but whether or not that mistake should result in a furlough of staff in order to pay a claim, or to delay the prosecution of warranted actions because there staff is not there, I think is a very difficult decision, certainly one for the Congress to consider. But I think that is a factor to be taken into consideration.

Senator GRASSLEY. Well, I appreciate your response to that. I am not sure, speaking for myself and no other Member, that I could say categorically that it ought to be one way or the other, but I suppose I start from the premise I just stated.

That is all the questions I have. We appreciate the broad range of testimony we had from this panel. It was all very good, and we look forward to working with you as we consider this legislation as we move into the new Congress.

Thank you all very much.

[The prepared statements of Messrs. Cadwell and Smith and additional submissions of the Administrative Conference of the United States follow:]

Prepared Statement of Charles Cadwell

Mr. Chairman, I appreciate the opportunity to provide the Subcommittee information on the Equal Access to Justice Act. This important small business legislation is but one of several important small business regulatory reform efforts which have been enacted in the past couple of years.

Meaningful reform for small business can come in three ways:

- -Legislative re-direction to agencies with respect to overall regulatory goals and methods
- -Administrative action to reduce regulatory burdens
- -Changes in the way rules are enforced

The Regulatory Flexibility Act, which requires agencies to analyze small business impacts of proposed rules and explain that impact in a public way, focuses on the second of these three methods of reform. The Regulatory Flexibility Act's goal is to improve and reduce small business regulatory burdens by establishing a process for small business interests to be considered by every Federal regulator.

By awarding attorneys fees, the Equal Access to Justice Act expanded the liability of the Federal government in agency proceedings and in court actions in order to equalize the litigating power of small entities. The Act seeks to enforce greater accountability on those who bring the power and resources of the Federal government to bear against an individual or small business. As the Act is evaluated, as amendments are proposed, they should be viewed in light of this basic goal.

The Equal Access to Justice Act will expire on October 1, 1984 unless Congress extends it; thus your ongoing attention to the

Act is important to assure that Congress' debate in the next year and the year after is fully informed.

We cannot answer the question "Is the Act working?" today. At this time there are few reliable measures of the Act's efficacy for several reasons.

First, there have been few cases in which the successful litigant has sought to recover attorneys fees. As the Administrative Conference of the United States and the Administrative Office of the United States Courts will report, there have been less than 100 decisions issued with respect to claims for attorneys fees and in less than 25 have there been actual awards. While it may be that this low level of activity reflects the diminishing number of agency actions which are not substantially justified, it more likely reflects several other conditions as well. Small business understanding and utilization of new statutory provisions always takes time in order for firms to learn of the Act's existence, understand its relevance to them and pursue their claims to the stage where awards for fees may be made.

A second measure of the Act's usefulness may be the level of complaints about agency enforcement policies. If the number of complaints are lower, it could very well reflect the caution that agencies are using to insure their actions are substantially justified. A minute number of the calls to our offices new toll-free Small Business Answer Desk concern enforcement actions of Federal agencies.

Although it may be difficult to measure the Act's impact a few observations are possible. First, the Act is resulting in awards of fees where courts or agencies are determing that government actions were not substantially justified. However

the Courts are not uniform in their interpretations of the Act. Some small businesses have recovered attorneys fees. This is a positive sign. The Act is not living up to the fears expressed by its opponents. We have not seen thousands of claims for millions of dollars under the EAJA; the courts and the agencies are not clogged with frivolous claims for attorneys fees. The typical award by a court is under $5,000; in this first year the total awards are less than one million dollars.

As you know the Act gives only one specific role to the Office of Advocacy: to consult with the Administrative Conference of the United States on their annual report on the Act. This is occurring. However, in our larger role, as small business advocate, we have taken several actions to assist in implementation of the Act. As the Department of Justice developed its rules for implementation of the EAJA, we engaged in detailed discussion with staff. We urged them to modify their language with respect to the burden of proof and the documentation required for claimants to assure that the Act would best serve the needs of small business. We also commented directly to several agencies on similar issues.

Aside from working with Federal agencies, we have distributed to small businesses and small trade associations about 10,000 copies of a pamphlet describing the provisions of the Act. We also provide informal explanations of the Act and its legislative history for small business and their counsels who are referred to us by our regional advocates. The effort to alert the small business community to this legislation needs to continue.

Mr. Chairman, there is other value to these hearings today and that is as a forum for discussion of issues faced by the twelve

states that have enacted their own equal access legislation, and the many other states where bills are pending. As enforcement authority for Federal regulatory schemes is shifted to the states, and as contracting activity is devolved through greater use of block grants, there is an increased need to insure that state officials face similar constraints on unjustified actions against small businesses as do Federal officials. Most of the states that have enacted equal access laws have patterned them after the Federal statute, although some establish a much higher standard for claimants. For example, some states require that the claimant demonstrate that state actions are without a reasonable basis rather than requiring the states to show that their actions are "substantially justified." Because many of the arguments raised against state bills are the same as those that were used to object to the Federal law, the reports of the Administrative and Judicial Conferences will be particularly useful tools for putting such objections in a realistic perspective.

In summary Mr. Chairman, the Equal Access to Justice Act is an important part of the broad effort to make government agencies more accountable for their actions. By imposing a financial burden on government agencies which improperly pursue legal claims, the law can reduce unnecessary enforcement activity and focus regulatory effort where it is needed. It is a law that more small businesses need to know about and use. We intend to continue on efforts in this area and to work to promote complete implementation of the provisions of this law by Federal agencies. Thank you.

PREPARED STATEMENT OF LOREN A. SMITH

PRESENTED BY STEPHEN L. BABCOCK

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to testify before you today concerning the first year of experience with the Equal Access to Justice Act. With me today are two members of the Office of the Chairman: Stephen L. Babcock, the Executive Director of the Office, and Staff Attorney Mary Candace Fowler. As you know, the Equal Access to Justice Act gave the Chairman of the Administrative Conference of the United States two responsibilities to act as a consultant to the Federal agencies concerning their regulations to implement the Act, and to monitor the operation of the Act at the agency level and to report annually the Congress on how it is working.

We have just completed our report on the first year of operations under the Act—the year October 1, 1981 through September 30, 1982—and I have with me copies of that report which we have transmitted to the Congress this morning. Before I discuss the specifics of how the Equal Access to Justice Act has worked during this first year, however, you may be interested in some information on what this agency's mission is and how it operates.

Background and Structure of the Conference

The Administrative Conference of the United States is a Federal agency whose mission is to perform studies and to recommend improvements in the administrative procedures used by all Federal departments and agencies. The Conference was established in 1964 by the Administrative Conference Act, 5 U.S.C. §§ 571-576.

The structure of the Conference is unique among Federal agencies, and reflects the purpose of bringing together knowledgeable persons from within and outside of the Government for the cooperative study of common problems and the development of a consensus on proposals for improvements.

The Conference is headed by a Chairman, appointed by the President for a five-year term with the advice and consent of the Senate. The Chairman is assisted by a Council, which operates similarly to a board of directors. The Council has eleven members, the Chairman himself, plus ten members appointed by the President, at least five of whom must be from outside the Federal government.

The membership of the Conference consists of 44 members designated by those Federal agencies entitled to representation on the Conference, and 36 public members appointed by the Chairman with the approval of the Council for two-year terms. The members meet at least once a year in plenary session to adopt recommendations and to consider other matters of Conference business. Between plenary sessions, the members serve on the Conference's six standing committees, which work to develop Conference recommendations and other items for presentation to the Assembly.

In the day-to-day administration of the Conference, the Chairman is assisted by a small, but able, professional and clerical staff. The Chairman and his staff constitute the Office of the Chairman.

The chief products of the Conference are its recommendations and research reports. In its 14-year existence the Conference has met in plenary session 24 times and has adopted 91 recommendations and seven other formal statements. Our recommendations have ranged over the entire field of Federal administrative procedure. Some are addressed to problems common to many agencies, such as Recommendation 71-4, Minimum Procedures for Agencies Administering Discretionary Grant Programs, and Recommendation 73-1, Adverse Agency Publicity. Some are specific to a single agency or program, such as the series of recommendations directed to the Internal Revenue Service's procedures in dealing with individual taxpayers, Recommendations 75-5 through 75-10. While most recommendations are addressed to one or more agencies, some call for legislative action, such as Recommendations 68-7, 69-1, and 70-1, which called for the abolition of sovereign immunity and certain other technical defenses to suits for judicial review of agency action.

Special Statutory Advisory Assignments

While most of the Chairman's activities are in support of the work of the membership, the Congress from time to time gives the Office of the Chairman specific responsibilities in the areas of its expertise. For example, my Office was directed by the Congress to assist and advise agencies on their implementation of the Government in the Sunshine Act, to advise the Congress on the workings of the new procedures established for the Federal Trade Commission in the Magnuson-Moss Act, and to advise the Interstate Commerce Commission on its new procedures implementing the Railroad Revitalization and Regulatory Reform Act of 1976.

Our most recent assignment of this kind was given to us by the Equal Access to

Justice Act, which, as I said at the outset, gave two major responsibilities to the Chairman of the Administrative Conference: (1) to act as a consultant to agencies in the establishment of uniform procedures for the consideration of applications for fees and expenses in their own administrative proceedings; and (2) to prepare annual reports to Congress on the amount, scope, and impact of awards of fees made by the agencies in administrative proceedings under the Act.

The Model Equal Access to Justice Act Rules

We determined that an efficient way to accomplish the first task would be to develop model regulations for implementation of the Act, to serve as a guideline for agencies in adopting their own rules. We first organized a task force of staff members from affected Federal agencies and interested Congressional staff to help us identify problems and to conduct basic research on legal issues raised by the Act. Based on the task force's efforts, we prepared and published draft model regulations in March, 1981 (46 F.R. 15895). We then revised the model regulations in response to comments received from agencies and members of the public, publishing final model regulations in June, 1981 (46 F.R. 32900).

Virtually all of the agencies that have proposed or adopted regulations have followed the model very closely. These model rules promoted the statutory goal of uniformity and have saved the thirty-odd affected agencies a great deal of time and effort. In fact, we estimate the savings to the government resulting from our involvement amount to about three million dollars—an amount that is about three times our annual appropriation.

The Annual Report to Congress on the Equal Access to Justice Act

Our efforts toward fulfilling the Chairman's second responsibility under the Equal Access to Justice Act, the preparation of annual reports to Congress on agency experience under the Act, have involved obtaining the information necessary to evaluate the agencies' performance and the Act's impact. We designed, cleared through GSA, and distributed to the agencies a data collection system for this purpose. This task was completed in October, 1981, when the Act went into effect. Two forms, a quarterly report form and an individual case report form, elicit information including the types of proceedings in which fee awards are sought, the reasons agencies grant or deny awards,

the amount of awards actually made by agencies, the source of funds for paying awards, and the general impact of the Act on agency programs and budgets.

The results of our information collection efforts are found in the report to the Congress, carrying today's date, to which I referred at the outset of my remarks. As you can see, the most striking thing about the first year of experience with agency adjudications under the Act is that not one award has been made. There have been only 103 applications for awards filed with administrative agencies, and only three initial decisions by administrative law judges recommending the award of attorneys fees had been made by the end of the first year. In one of those cases the recommendation was reversed by the agency itself, because the application had not been filed within the thirty day time limit, and the remaining two proceedings are still pending before the agencies.

Approximately 14,000 proceedings to which this Act applies were completed by administrative agencies during the year. Slightly over half of these proceedings were conducted by one agency—the National Labor Relations Board. Thus it is not surprising that this agency received 49 of the total of 103 applications. As previously indicated, no agencies had actually made any payments under this Act as of September 30th. But the NLRB did report administrative expenses associated with the Act in the amount of $275,414.05. These are discussed at pages 7 and 8 of our report.

The statutory language which directs me to report annually to the Congress concerning this Act asks that I include any relevant information that may aid the Congress in evaluating the scope and impact of the Act. The extremely limited number of decisions that have been reached under the Act make it difficult to generalize. But a number of questions have been discussed among those interested in the operation of this Act which I would like to share with you.

First, I have been asked on several occasions why there are so few awards, when all those concerned with this legislation had predicted so much more activity under the Act. Unfortunately, I cannot answer this question. There are at least three plausible explanations: that applications are not being filed because litigants and their attorneys have not yet heard about the Act; that the instances of improper agency activity are simply far fewer than had been supposed, and that the agencies have changed their behavior because of the Act and are now avoiding the kinds of improper activities that would give rise to liability. Any attempt at evaluating these hypotheses would involve sheer speculation on my part, since no empirical research has been conducted. I do note, however, that many instances of improper agency activity, cited in the legislative history of the Act, involved "pre-litigation" situations—those in which the improper activities of

agency personnel might have been corrected by internal agency action, in the event of the initiation of actual litigation, even without the Act.

A second interesting question regards the source of payments for awards. As you may recall, the Act contains somewhat conflicting provisions as a result of the fact that Section 207 was added to the Act at the last minute as a floor amendment in the House to avoid the contention that the provisions providing for the payment of fees from agency budgets, codified in 5 U.S.C. §504(d) and 28 U.S.C. §2412(d)(4), constituted appropriations in authorizing legislation. But, while the exact meaning of the statutory language may have to be resolved by litigation if an agency chooses to resist paying an award from its own appropriation, that situation has apparently not yet arisen: We are not aware of any instance in which an agency has refused to pay an award, once concededly due, from its own appropriation.

The Subcommittee may also be interested in another question that has arisen in court decisions interpreting the Act. Eligible applicants may recover their fees if the "position of the United States" was not substantially justified. But courts have disagreed on the question of whether the phrase "position of the United States" refers to the postion of the United States in the litigation only, or whether that phrase refers as well to the position of the United States in the events that gave rise to the litigation. For example, one applicant had attempted without success for some time to collect an amount owed by the government. When the applicant's attorney finally filed suit, the government promptly conceded the debt, paid it, and moved to dismiss the case. In this instance the court held that the phrase "position of the United States" did not refer to the activities of the government before the litigation was instituted and hence denied recovery. Alspach v. District Director of Internal Revenue, 527 F.Supp. 225 (D. Md. 1981) Other courts, however, have held to the contrary. See, e.g., Photo Data, Inc. v. Sawyer, 533 F.Supp. 348 (D. D.C. 1982); Berman v. Schweiker, 531 F.Supp. 1149 (N.D. Ill. 1982).

Another question on which the courts have not agreed is whether attorneys fees and expenses incurred prior to October 1, 1981, the effective date of the Act, are recoverable. Section 208 of the Act states that the Act applies to any civil action or adversary adjudication "pending on" the effective date of the Act, but is silent on the question of whether fees for time spent on a matter prior to that effective date are compensable.

A third interesting question is whether contract appeals boards and certain courts such as bankruptcy courts have the power to make awards. While the coverage of the

Act at the administrative level by its terms is limited to those adversary adjudications conducted under 5 U.S.C. §554 (which section does not apply to contract appeals board proceedings), and while the Act also does not extend to such non-Article One courts as the bankruptcy courts, both types of bodies have held that they do have the power to make awards under this Act. The reasoning of the contract appeals boards is set out on pages 4 and 5 of our Annual Report. A similar argument is presented in Graham v. United States, No. 81-0188 (Bankr. D. Idaho, Mar. 11, 1982).

Courts and administrative bodies both have held that the provision of the Act that requires applications to be filed within 30 days after the date of the decision in the underlying proceeding is jurisdictional, and that judges and administrative law judges therefore cannot waive that time limit even when good cause has been shown. It is not clear that Congress intended this result, and the Subcommittee may wish to consider whether or not it wishes to give agencies and courts the power to waive 30-day the provision in appropriate circumstances.

Finally, if legislation to amend this statute is proposed, the Subcommittee may wish to consider whether specific provision should be provided for the confidential treatment of financial information submitted by applicants to establish their net worth, and whether to amend the definition of an eligible party, as set out in 28 U.S.C. 2412(d), to conform to the definition now provided in 5 U.S.C. §504.

This concludes our prepared testimony. As I said at the outset, we very much appreciate the opportunity to appear before you today, and we hope that our work under the Equal Access to Justice Act has satisfied Congress' expectations. We enjoy receiving assignments of the kind given to us under the Equal Access to Justice Act, and we believe that our efforts here have contributed to the fairness and efficiency of administrative procedures and of the administrative process, which are this agency's statutory goals.

We will be pleased to answer any questions that you may have.

REPORT OF THE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON AGENCY ACTIVITIES UNDER THE EQUAL ACCESS TO JUSTICE ACT

LOREN A. SMITH
CHAIRMAN

The Equal Access to Justice Act, Title II of Pub. L. 96-481, 94 Stat. 2325, which became effective October 1, 1981, provides for the award of fees and expenses to certain litigants who prevail against the United States in agency adjudications or civil court proceedings. Under the Act, a prevailing party is entitled to an award of reasonable attorneys' fees (ordinarily limited to $75 per hour) and other expenses unless the United States can show that its position in the litigation was substantially justified. A fee award may be reduced or denied when the party seeking it has caused undue delay, or when special circumstances would make an award unjust.

To qualify for an award, a party must meet the financial eligibility requirements of the statute, designed to target the Act's benefits toward those who would face significant financial obstacles in pursuing or defending litigation against the government. Eligible parties include sole proprietors, corporations, partnerships, and public or private organizations with a net worth of not more than $5 million and not more than 500 employees, tax-exempt organizations under 26 U.S.C. §501(c)(3) and agricultural cooperatives under 12 U.S.C. §1141j(a) with not more than 500 employees, regardless of net worth, and individuals with a net worth of not more than $1 million.

The provisions of the Act covering agency proceedings, codified in 5 U.S.C. §504, limit the applicability of the Act to formal hearing proceedings under Section 5 of the Administrative Procedure Act, 5 U.S.C. §554, in which the position of the United States is represented by counsel or otherwise, excluding ratemaking and licensing proceedings. The agencies themselves are to decide whether fee awards are warranted in particular cases, and the Act directs the agencies to establish uniform procedures for the consideration of applications for awards of fees and expenses after consultation with the Chairman of the Administrative Conference of the United States ("ACUS"). 5 U.S.C. §504(c)(1). The Act further directs the Chairman of ACUS to report annually to Congress on the amount of fees and expenses awarded under the Act in agency proceedings, providing information that will help Congress to evaluate the scope and impact of those awards. 5 U.S.C. §504(e). This is the first such annual report under the

Act, covering the period from October 1, 1981 through September 30, 1982. Although no awards of fees and expenses were made in agency proceedings during this period, the report describes agency activities under the Act.

Agency Rulemaking

To facilitate the adoption of agency procedures for the consideration of requests for fee awards under the Equal Access to Justice Act, and in partial fulfillment of his consultative responsibilities, the Chairman of ACUS decided to issue model rules for agency implementation of the Act. With the assistance of an interagency task force, the Office of the Chairman prepared draft model rules and published them for comment in the Federal Register (46 F.R. 15895, March 10, 1981). After revising the draft in light of the comments received, the Office of the Chairman published final model rules for the guidance of agencies in June, 1981 (46 F.R. 32900, June 25, 1981). The model rules set forth the basic requirements of the Act, describe the format and contents of applications for attorneys' fees, and detail administrative procedures for considering and deciding on applications.

Thirty-one agencies have now issued proposed, interim or final rules under the Equal Access to Justice Act. All of these agencies but one [1] have relied substantially on the ACUS model rules, and the vast majority have followed the model completely, making only minor changes necessary to harmonize the rules with existing agency procedures. Thus the statutory goal of uniformity has been largely achieved. [See Appendix I for a list of agency rules with Federal Register citations.]

The ACUS Reporting System

As noted above, the Chairman of ACUS is required to report annually to Congress on agency activities under the Act, after consultation with the Chief Counsel for Advocacy of the U.S. Small Business Administration. Agencies are to provide the Chairman with the information necessary to prepare this report. With the assistance of

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1/ The Merit Systems Protection Board issued a proposed rule far less detailed than the ACUS model; since only a few of its proceedings are covered by the Equal Access to Justice Act, the Board may not anticipate a need for more elaborate procedures.

the Office of Advocacy of the SBA, the General Services Administration and others, ACUS staff developed report forms requesting quarterly data on case loads and numbers of applications for fee awards as well as case-by-case information on applications for fee awards disposed of by agencies.

The agencies have generally been cooperative in gathering the necessary information and submitting the forms to ACUS; after inevitable initial delays in establishing reporting channels within each agency, the reporting system is now in place and effective. Nevertheless, obtaining complete, accurate data has been a challenging task. In some agencies, litigation is handled by a number of discrete regional or district program units, and gathering information in a centralized location is difficult. Also, agencies such as the General Services Board of Contract Appeals and the Armed Services Board of Contract Appeals were not initially included in the ACUS reporting system because ACUS did not believe they conducted covered proceedings, yet these agencies have received and processed applications for attorneys' fee awards.[2] Thus the figures that follow, while accurately reflecting the agency reports made to ACUS, may in some cases be incomplete or estimated. They do, however, provide an accurate overview of the first year of agency experience under the Equal Access to Justice Act.

Agency Proceedings Under the Equal Access to Justice Act

During the first year after the Equal Access to Justice Act became effective, over 14,000 administrative proceedings potentially covered by the Act were concluded by the agencies.[3] Only 103 applications for awards of fees and expenses under the Act were filed in these proceedings. Of these, 49 were filed with one agency, the National Labor Relations Board, which handled over half the covered proceedings completed. Another 15 were filed with the Armed Services Board of Contract Appeals. [Appendix II includes data on applications filed, by agency.]

The Equal Access to Justice Act does not apply directly to proceedings before agency boards of contract appeals, because they are not adjudications under 5 U.S.C.

2/ ACUS has obtained some figures from these agencies which are included in the report.

3/ This figure is approximate, since it was very difficult for agencies to develop precise data on their totals of covered proceedings. It is offered only as a general guide to the probable volume of covered proceedings. It does not include contracts or grants appeals board cases.

§554. However, section 8(d) of the Contract Disputes Act, 41 U.S.C. 607(d), authorizes contract appeals boards "to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." Since the Court of Claims can award attorneys' fees under the court provisions of the Equal Access to Justice Act, 28 U.S.C. §2412, some contract appeals boards have taken the position that they also can make Equal Access to Justice Act awards. At least three boards have formally asserted this authority: the General Services Board of Contract Appeals, the Armed Services Board of Contract Appeals, and the Department of Agriculture Board of Contract Appeals. The Agriculture Department itself, in its regulations implementing the Act, has ruled that contract apeals cases are not covered proceedings, as have the Postal Service, the National Aeronautics and Space Administration, and the Department of Labor.

Of the applications filed, 72 were pending or stayed as of September 30, 1982. The remaining 31 applications were all disposed of without an award of fees, 25 by denial of the application and six by settlement without an award, withdrawal by the applicant, or dismissal without decision or award. Thus no agencies have yet paid any attorneys' fee awards under the Equal Access to Justice Act in administrative proceedings.

In two of the pending proceedings, however, administrative law judges have granted fee awards in initial decisions. In one enforcement proceeding before the National Transportation Safety Board, the ALJ ruled that the Federal Aviation Administration was liable to the applicant, a flight instructor, for an award of $6,983.92 — $6,320.25 in attorneys' fees, $163.67 in expenses, and $500.00 in expert witness fees. An administrative law judge at the National Labor Relations Board awarded a total of $14,137.60 — $13,470.00 in fees (including $3,311.25 in fees for pursuing the fee application) and $667.60 in expenses — to a contracting company that successfully defended against an unfair labor practice charge.[4] Both fee awards were based on the maximum statutory rate of $75 per hour.[5] Both proceedings are now awaiting agency review of the fee decision.

A review of the proceedings in which applications were denied reveals that most of them (21 of 25) were administrative enforcement proceedings. Another three were

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4/ In a second NLRB proceeding, the grant of an award by an ALJ was overturned by the Board because of failure by the applicant to meet the 30-day statutory filing deadline.

5/ The Act provides that agencies may increase this statutory ceiling by rulemaking. 5 U.S.C. §504(b)(1)(A). The NLRB has received and dismissed one petition for rulemaking to increase the fee ceiling.

contract appeals. The applicants were usually businesses; four individuals and two unions also applied. The applications were denied most often (ten times) because the government's position was substantially justified. Five applications for fee awards were denied because the applicant failed to file within 30 days after final disposition of the proceeding; the agencies faced with the question have ruled that the 30-day limit for filing an application is jurisdictional and have applied the time period strictly. Other applications were denied because the proceeding was not pending on the effective date of the Act (three applications), because the applicant was not a prevailing party (three applications), because the applicant was ineligible (two applications), or because, under 28 U.S.C. §2412(d)(3),[6] the agency was without jurisdiction over the application (two applications). [See Appendix III for additional data on the denied applications.]

In deciding whether awards should be denied because the government's position was substantially justified, agency adjudicative officers have considered their own agency regulations, the legislative history of the Act, and sometimes the case law under Rule 37 of the Federal Rules of Civil Procedure, from which the substantial justification language was taken. In most of the proceedings in which the question of substantial justification was reached, the adjudicative officers have carefully analyzed the legal and factual issues to determine whether the government's position was reasonable in law and fact. Generally the cases in which a finding of substantial justification was made have turned on credibility issues or on the resolution of a legitimate question as to the applicability of the law to a particular set of facts. This contrasts with the two pending proceedings in which adjudicative officers have recommended awards because the government's position was not substantially justified. In the NTSB proceeding, the FAA pursued an enforcement proceeding against a flight instructor for falsification of logs despite the fact that the complaining witness repeatedly told the agency that he had lied in his original statement. In the case before the National Labor Relations Board, the administrative law judge held that the trial attorney should have known from the facts available to him before issuance of the complaint that no violation of the law had occurred.

6/ 28 U.S.C. §2412(d)(3) provides that courts awarding fees in actions for judicial review of covered agency proceedings shall make awards for the agency proceedings as well as the judicial review actions.

Agency Administrative Costs

In its quarterly report form, ACUS asked agencies to estimate their administrative costs (staff time, direct expenses and overhead), excluding the cost of fee awards, incurred in connection with the Equal Access to Justice Act, and to describe the impact of the Act on agency operations. The agencies' responses to these questions were generally not very informative. Several agencies, having received no applications for awards, reported negligible impact or did not respond at all. The estimates of administrative costs that were provided varied widely (though most were small) and did not appear to be particularly refined or reliable.

However, the National Labor Relations Board submitted a statement on the Act's impact that was more substantial than the other agencies' responses. The Board's experience is significant because it has handled almost half the applications for attorneys' fee awards filed with administrative agencies to date. The Board reported that it had not changed its litigation policies in response to the Equal Access to Justice Act, since its system for screening cases is already effective. But it did note that the Act had changed agency priorities in another way:

> As noted above, this Agency has not had to make any payments under EAJA. We have, however, had to divert a substantial amount of staff time to handling EAJA claims. This time includes that of the General Counsel, the Board, top management staff, Administrative Law Judges, attorneys and clericals. Given the substantial staff and budget constraints which faced this Agency in FY 82 and which we expect to face in FY 83, EAJA has had a negative impact on this Agency's program. And, in that sense, we have changed Agency priorities because the staff time used for EAJA cases would have been utilized in NLRA matters and thus would have greatly assisted us in better meeting the challenges posed by the budget constraints we face.

The Board reported first year costs estimated at $275,414.05 associated with the Act, including $135,800 for pre-effective date implementation activities ($35,000 for agency rulemaking, $90,000 for training of regional staff, and $10,000 for developing headquarters management procedures and case-handling guidelines). The Board concluded, however, that "it is still too early to assess the full impact of [the Act] on agency operations."

Appendix I

Equal Access to Justice Act Regulations

AGENCY	STATUS OF RULE	FEDERAL REGISTER CITATION
Interstate Commerce Commission	Proposed rule	46 F.R. 41825 (August 18, 1981)
	Final rule	46 F.R. 61659 (December 18, 1981)
Federal Communications Commission	Proposed rule	46 F.R. 43068 (August 28, 1981) 46 F.R. 44789 (September 8, 1981) (correction)
	Final rule	47 F.R. 3785 (January 27, 1982)
Federal Deposit Insurance Corporation	Proposed rule	46 F.R. 43431 (August 28, 1981)
	Final rule	46 F.R. 62812 (December 29, 1981)
National Transportation Safety Board	Proposed rule	46 F.R. 44797 (September 8, 1981)
	Final rule	46 F.R. 48208 (October 1, 1981)
U.S. Postal Service	Final rule	46 F.R. 45943 (September 16, 1981)
Federal Home Loan Bank Board	Interim rule	46 F.R. 46894 (September 23, 1981)
Occupational Safety and Health Review Commission	Interim rule	46 F.R. 48078 (September 30, 1981)
National Labor Relations Board	Final rule	46 F.R. 40886 (September 30, 1981)
National Credit Union Administration	Interim rule	46 F.R. 48120 (October 1, 1981)
	Final rule	47 F.R. 38267 (August 31, 1982)
Federal Labor Relations Authority	Interim rule	46 F.R. 48623 (October 2, 1981)
Federal Trade Commission	Final rule	46 F.R. 48910 (October 5, 1981)
Justice Department	Interim rule	46 F.R. 48921 (October 5, 1981)
	Final rule	47 F.R. 15774 (April 13, 1982)
Department of Transportation	Interim rule	46 F.R. 49878 (October 8, 1981)
Department of Labor	Final rule	46 F.R. 63020 (December 29, 1981)
Civil Aeronautics Board	Interim rule	46 F.R. 51375 (October 20, 1981)
	Proposed rule	46 F.R. 58510 (December 2, 1981)
	Final rule	47 F.R. 16006 (April 14, 1982) 47 F.R. 18587 (April 30, 1982) (correction)
Treasury Department	Temporary rule	46 F.R. 53025 (October 28, 1981)
	Final rule	47 F.R. 20763 (May 14, 1982)

AGENCY	STATUS OF RULE	FEDERAL REGISTER CITATION
Nuclear Regulatory Commission	Proposed rule	46 F.R. 53189 (October 28, 1981)
International Trade Commission	Interim rule	46 F.R. 56780 (November 19, 1981)
	Final rule	47 F.R. 9389 (March 5, 1982)
Consumer Product Safety Commission	Proposed rule	46 F.R. 46814 (November 19, 1981)
	Final rule	47 F.R. 25512 (June 14, 1982)
Commodity Futures Trading Commission	Final rule	46 F.R. 57669 (November 25, 1981)
State Department	Final rule	46 F.R. 58301 (December 1, 1981)
Securities and Exchange Commission	Final rule	47 F.R. 609 (January 6, 1982)
National Aeronautics and Space Administration*	Interim rule	47 F.R. 3758 (January 27, 1982)
Federal Energy Regulatory Commission	Proposed rule	47 F.R. 4313 (January 29, 1982)
Federal Mine Safety and Health Review Commission	Interim rule	47 F.R. 10000 (March 9, 1982)
Department of Health and Human Services	Interim rule	47 F.R. 10824 (March 12, 1982)
Department of Commerce	Interim rule	47 F.R. 13509 (March 31, 1982)
Environmental Protection Agency	Interim rule	47 F.R. 16780 (April 20, 1982)
Small Business Administration	Interim rule	47 F.R. 22082 (May 21, 1982)
Department of Agriculture	Final rule	47 F.R. 26611 (June 21, 1982)
Merit Systems Protection Board	Proposed rule	47 F.R. 52184 (November 19, 1982)

* NASA adopted rules although it stated that it does not believe it conducts any covered proceedings.

Appendix II

Agencies Receiving Applications for Awards of Fees and Expenses Under the Equal Access to Justice Act in Administrative Proceedings
October 1, 1981 - September 30, 1982

Agency	Total Covered Proceedings Decided [1]	Total Applications Received	Applications Granted	Applications Denied or Disposed of Without Award	Applications Pending or Stayed on September 30, 1982
Department of Agriculture	255	2	0	1	1
Armed Services Board of Contract Appeals	not available	15	0	5 (3 withdrawn or dismissed w/o decision)	10
Department of Commerce	95	1	0	1	0
Environmental Protection Agency	34	2	0	1 (settled w/o award)	1
Federal Communications Commission	24	1	0	1	0
General Services Board of Contract Appeals	not available	6	0	0	6
Department of Health and Human Services	not available	2	0	0	2
Department of the Interior	553	5	0	1	4 [2]
Department of Labor	154	2	0	1 (settled w/o award)	1
National Labor Relations Board	7,338	49	0	17	32 [3]

Agency	Total Covered Proceedings Decided [1]	Total Applications Received	Applications Granted	Applications Denied or Disposed of Without Award	Applications Pending or Stayed on September 30, 1982
National Transportation Safety Board	127	5	0	0	5
Nuclear Regulatory Commission	not available	1	0	0	1 [4]
Occupational Safety and Health Review Commission	2,485	8	0	2	6
Postal Service	127	1	0	0	1
Department of Transportation	497	2	0	0	2
Department of the Treasury	26	1	0	1 (withdrawn by counsel)	0
Total: All Agencies	11,715 [5]	103	0	31	72

1/ These figures, where available, are approximate.

2/ These applications are stayed pending issuance of Interior Department rules for the processing of applications for awards. In the one case decided by the Interior Department, it was held that the proceeding concluded before October 1, 1981 and thus was not covered by the Act.

3/ Thirty of these applications are pending at the agency and two are stayed pending judicial review.

4/ This application is stayed pending a ruling from the General Accounting Office on whether a provision in the Nuclear Regulatory Commission's appropriation legislation prohibits awards to intervenors under the Equal Access to Justice Act.

5/ An additional 3,250 covered proceedings were reported to ACUS by agencies that received no applications.

Appendix III

Data on Denied Applications
for Awards of Fees and Expenses

October 1, 1981 - September 30, 1982

Table III-A

Reason for Denial of Applications

	Number of Proceedings
Proceeding closed before effective date of Act	3
Application not timely filed	5
Applicant did not prevail	3
Applicant ineligible	2
Government's position was substantially justified	10
Proper jurisdiction in court, not agency (28 U.S.C. §2412(d)(3))	2

Table III-B

Type of Applicant

	Number of Proceedings
Businesses, including sole proprietors	15
Unions	2
Individuals	4
Unknown (information not available)	2

Table III-C

Type of Proceeding

	Number of Proceedings
Enforcement	21
Contract appeal	3
Other	1

[From the Tulane Law Review, vol. 56, No. 3, Apr. 1982]

RECOVERING ATTORNEYS' FEES FROM THE GOVERNMENT UNDER THE EQUAL ACCESS TO JUSTICE ACT

REUBEN B. ROBERTSON*
MARY CANDACE FOWLER**

I. INTRODUCTION

Under the "American rule" generally applied by federal courts in the United States, the winners as well as the losers in litigation have to pay their own attorneys' fees.[1] The Equal Access to Justice Act,[2] which took effect for a three-year test period starting October 1, 1981,[3] significantly increases the opportunities for small businesses, charitable organizations and other parties involved in court or agency litigation with the federal government to recoup their attorneys' fees and other litigation expenses.[4] While the courts have traditionally found that the doctrine of sovereign immunity precludes fee shifting to the United States even under existing exceptions to the American rule,[5] absent a statute explicitly permitting such awards,[6] the

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1. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). By contrast, under the rule generally applied in English courts, the loser pays the winner's attorneys' fees. *See generally* Goodhart, *Costs*, 38 Yale L.J. 849 (1929).

2. Pub. L. No. 96-481, tit. II, 94 Stat. 2325 (1980). The Equal Access to Justice Act will frequently be referred to as "the Act" in this article.

3. *Id.* § 208. Provisions in §§ 203-204 of the Act repeal its provisions, except for those contained in 28 U.S.C. § 2412(a)-(c), effective October 1, 1984. The Act will continue to apply through final disposition of cases pending on that date.

4. *Id.* § 203(a)(1), 5 U.S.C. § 504(a)(1) (Supp. IV 1980) (administrative proceedings) and § 204(a), 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1980) (civil court cases). All citations to 5 U.S.C. § 504 concern administrative proceedings, while all citations to 28 U.S.C. § 2412 deal with court proceedings.

5. *E.g.*, West Central Mo. Rural Dev. Corp. v. Phillips, 368 F. Supp. 567 (D.D.C. 1973). *See also* 28 U.S.C. § 2412 (1976), as it read before amendment by the Equal Ac-

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very fact that the government has lost creates the basis for an award to a party eligible under the new law.

The Act authorizes the award of attorneys' fees and expenses against the government in civil court actions brought by or against the United States, except for tort cases[7] and those covered by some other statutory provision authorizing attorneys' fees to be awarded.[8] It also provides for fee awards to be made against the government in "adversary adjudications" conducted by federal agencies, defined as adjudications under section 554 of the Administrative Procedure Act[9] in which the position of the United States is represented by counsel or otherwise, but not including proceedings conducted "for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license."[10]

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cess to Justice Act.

One provision of the Act, codified in 28 U.S.C. § 2412(b) (Supp. IV 1980), expands existing exceptions to the American rule by authorizing the award of attorneys' fees against the United States whenever fees would be assessed against private litigants under any common law or statutory exception to the American rule, unless such a statutory exception expressly prohibits fee awards against the United States. These awards are to be governed by the standards of the particular statute or doctrine applicable to the individual case. The effects of this provision are beyond the scope of this article, in which references to "the Act" will mean those provisions, contained in 5 U.S.C. § 504 (Supp. IV 1980) and 28 U.S.C. § 2412(d) (Supp. IV 1980), creating a new exception to the American rule.

6. A list of statutes explicitly permitting awards of attorneys' fees against the United States can be found in Cohen, *Awards of Attorney's Fees by Federal Courts and Federal Agencies*, Report No. 81-30A, Congressional Research Service 11-17 (1981), *reprinted in Award of Attorneys' Fees Against the Federal Government, Hearings on S.265 Before the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 611-29 (1980).

7. 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1980). Although the term "civil action" used in the Equal Access to Justice Act appears to include all non-criminal tax cases, tax litigation brought in the United States Tax Court is in fact not covered by the Act. Under 28 U.S.C. § 451, the "courts" to which the provisions of Title 28 apply include those whose judges "hold office during good behavior" and the bankruptcy courts. Since judges at the Tax Court hold office for a term of years, it is not a court to which the provisions of Title 28, including § 2412, apply. Civil tax cases in federal district courts and in the Court of Claims, however, are covered by the Act, a point that may influence attorneys in selecting a forum for contesting tax issues. This anomaly was evidently inadvertent, since there is no indication in the legislative history of any congressional intent to treat Tax Court cases differently from other tax cases.

8. Pub. L. No. 96-481, tit. II, § 206, 94 Stat. 2325, 2330 (1980).

9. 5 U.S.C. § 554 (1976). [Hereinafter, the Administrative Procedure Act will be referred to as the APA.]

10. 5 U.S.C. § 504(b)(1)(C) (Supp. IV 1980). The legislative history makes clear that the exception for licensing proceedings does not include license revocation, suspension, or modification proceedings, which Congress intended the Act to cover. S. Rep. No.

To be entitled to an award of attorneys' fees and expenses, a party must prevail over the United States. The legislative history[11] explains that "prevailing" is to be defined as it is under existing statutes providing for attorneys' fee awards to prevailing parties, which means that parties may prevail by obtaining favorable settlements or voluntary dismissals or by winning on some significant, separable issues even if not on all issues in the case.[12] The party must also meet certain eligibility standards, since the Act is not intended to benefit parties with unlimited resources, but only those for whom financial considerations may be a significant deterrent to pursuing litigation.[13] Thus parties who may receive awards are limited to four categories: individuals whose net worth does not exceed $1 million; businesses, entities, and public or private organizations (including sole owners of unincorporated businesses) with $5 million or less in net worth and no more than 500 employees; tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code[14] with no more than 500 employees; and agricultural cooperatives

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253, *Report of the Comm. on the Judiciary on S. 265*, 96th Cong., 1st Sess. 17 (1979); H.R. Rep. No. 1418, *Report of the Comm. on the Judiciary on S. 265*, 96th Cong., 2d Sess. 15 (1980). See note 11 *infra* for a discussion of the relationship of these committee reports to H.R. 5612, the bill actually enacted.

11. The Act has an unusual legislative history. The only congressional report on the bill enacted, H.R. 5612, that contains any reference to the Equal Access to Justice Act provisions is the House Conference Report, H.R. Rep. No. 1434, 96th Cong., 2d Sess. (1980). The Act was added to H.R. 5612, a small business assistance bill, by a floor amendment in the House of Representatives. 126 Cong. Rec. H10213-31, 96th Cong., 2d Sess. (daily ed. Oct. 1, 1980). The provisions of the amendment were virtually identical to those of S. 265, a bill that had been reported favorably by the House Judiciary Committee the day before, H.R. Rep. No. 1418, *supra* note 10. With minor differences, S. 265 had been reported favorably by the Senate Judiciary Committee, S. Rep. No. 253, *supra* note 10, and passed overwhelmingly by the Senate in 1979. 125 Cong. Rec. S. 10911-26 (daily ed. July 31, 1979). The bill's chief sponsors were Senators Pete Domenici (R. N.M.) and Dennis DeConcini (D. Ariz.), who were concerned in particular about the problems faced by small businesses in dealing with unreasonable government regulators. A bill with an even stronger small business orientation, H.R. 6429, was reported favorably by the House Small Business Committee, H.R. Rep. No. 1005, Part 1, *Report of the Committee on Small Business on the Small Business Equal Access to Justice Act*, 96th Cong., 2d Sess. (1980), but never reached the floor of the House of Representatives. Because the provisions of Senate bill 265 are nearly identical to those of the Act, this article frequently cites the Committee reports on that legislation. For convenience, these reports will often be referred to as reports on, or legislative history of, the Act.

12. H.R. Rep. No. 1434, *supra* note 11, at 22.

13. *See* Pub. L. No. 96-481, tit. II, § 202(a), 94 Stat. 2325 (1980).

14. 26 U.S.C. § 501(c)(3) (1976).

under section 15(a) of the Agricultural Marketing Act[15] with no more than 500 employees.[16]

Even eligible prevailing parties will be denied awards if the position of the United States was substantially justified, or if special circumstances make an award unjust.[17] An award may also be reduced or denied if the party seeking it has unduly protracted the proceedings.[18] The "substantially justified" standard is borrowed from the provisions of the Federal Rules of Civil Procedure establishing sanctions for failure to make discovery.[19] The "special circumstances" clause is also based on the discovery provisions of the Federal Rules. In addition, the Supreme Court has stated that special circumstances may justify denial of an award of attorneys' fees under civil rights fee-shifting statutes.[20] This option has seldom been relied on by courts to deny awards under these statutes, although many cases have identified factors that do not constitute "special circumstances."[21] According to the congressional committee reports on the Equal Access to Justice Act, the clause "helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often

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15. 12 U.S.C. § 1141j(a) (1976).

16. 5 U.S.C. § 504(b)(1)(B) (Supp. IV 1980); 28 U.S.C. § 2412(d)(2)(B) (Supp. IV 1980).

17. 5 U.S.C. § 504(a)(1) (Supp. IV 1980); 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1980).

18. 5 U.S.C. § 504(a)(3) (Supp. IV 1980); 28 U.S.C. § 2412(d)(1)(C) (Supp. IV 1980).

19. Fed. R. Civ. P. 37. *See* text at section VI *infra*.

20. Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

21. *E.g.*, Riddell v. National Democratic Party, 624 F.2d 539 (5th Cir. 1980) (defendant's good faith; award ultimately to be paid by taxpayers); Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279 (8th Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980) (success on a counterclaim against the prevailing party); Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) (uncertainty in the law). One case combined several factors that independently would be inadequate for a finding of special circumstances to deny attorneys' fees:

> The Fifth Circuit has rejected (1) good faith on the part of the defendants; (2) a finding of unintentional discrimination; (3) plaintiff's financial ability to pay counsel fees; (4) defendant's good-faith belief that a challenged statute is valid; and (5) that the burden of a fee award will fall on the taxpayers, as insufficient to constitute special circumstances rendering an award of attorney's fees unjust. However, this case combines all five of these factors with the added ingredient of a plaintiff who is a partisan, political organization. Added together they rise to the level of special circumstances.

Concerned Democrats of Fla. v. Reno, 493 F. Supp. 660, 664 (S.D. Fla. 1980).

underlie vigorous enforcement efforts," as well as permitting awards to be denied where equitable considerations so dictate.[23]

A party who clears these hurdles is entitled to recover "reasonable" attorneys' fees, to be calculated at prevailing market rates up to seventy-five dollars an hour. In addition, the party may receive the reasonable expenses of expert witnesses, up to the highest fee that may be paid such experts by the agency involved in the litigation, and the reasonable cost of any studies, tests, projects, analyses or engineering reports that were necessary to the preparation of the party's case.[24] A party seeking a fee award must file an application with the court or agency that decided the case within thirty days after final disposition of the proceeding.[24] One court has held that this time limit is jurisdictional and cannot be waived or extended.[25]

Potentially, the Act may have a dramatic impact in terms of awards made, the transfer of costs from private parties to the federal government, and, if awards are paid out of individual agency budgets,[26] restructuring of agency litigation programs. A 1980 Congressional Budget Office estimate set the cost of the Act at about $100 million per year.[27] However, its assumptions about the number of prevailing litigants who will be eligible for awards and the frequency with which the United States' position will be found to lack substantial justification were necessarily speculative.[28] In fact, as discussed below, examination of statutory terms such as the substantially justified standard suggests

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22. H.R. Rep. No. 1418, *supra* note 10, at 11; S. Rep. No. 253, *supra* note 10, at 7.

23. 5 U.S.C. § 504(b)(1)(A) (Supp. IV 1980); 28 U.S.C. § 2412(d)(2)(A) (Supp. IV 1980).

24. 5 U.S.C. § 504(a)(2) (Supp. IV 1980); 28 U.S.C. § 2412(d)(1)(B) (Supp. IV 1980).

25. Wallis v. United States, No. 453-79C (Ct. Cl., Nov. 25, 1981).

26. The issue of where funds for payment of awards will come from is discussed in section VIII *infra*.

27. The estimated costs were $92 million for fiscal 1982, $109 million for fiscal 1983, and $129 million for fiscal 1984. The Congressional Budget Office noted that the Office of Management and Budget estimated $205 million in first year costs, over double its own figure, based on different assumptions about the size of awards and the number of agency personnel needed to litigate cases. H.R. Rep. No. 1418, *supra* note 10, at 21-24.

28. For example, the Congressional Budget Office assumed a 55% loss rate in administrative cases, which seems quite high. H.R. Rep. No. 1418, *supra* note 10, at 22. The Budget Office also assumed that the Act would necessarily increase caseload totals, *id.* at 23, even though it might also prompt the United States to initiate fewer proceedings.

that awards may be less common than one might initially suppose. If the Act encourages federal litigators to act responsibly, however, it will have an important impact even if it does not result in a large number of awards.

Initially, in any event, the costs of implementing the Act may be very high. At the federal agency level, the cost of administering the Act may equal or exceed the actual cost paid out in awards, since agencies must process applications for awards themselves and are generally less familiar with this task than the federal courts.

In both agency and court proceedings, litigation over the terms and applicability of the Act is likely to be extensive. Its provisions raise a number of questions. For many of them, there are no clear precedents or analogues under previous fee-shifting statutes. While the Act builds on the principles developed under other statutes providing for the award of attorneys' fees, and its legislative history explicitly cites case law under such statutes to explain some of the Act's provisions,[29] it also differs significantly from these statutes. It requires first that parties seeking awards meet financial eligibility standards. It also applies to a broad range of administrative proceedings as well as to court cases.[30] Moreover, the Act's provisions are ambiguous on many important issues, affording ample fuel for disputes between federal agencies and parties seeking awards.

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29. For example, in explaining the term "prevailing party," the Conference Report directs that "interpretation is to be consistent with the law that has developed under existing statutes," and cites cases decided under the Freedom of Information Act, 5 U.S.C. § 552 (1976), the Copyright Act, 17 U.S.C. § 505 (1976), and the Emergency School Aid Act, 20 U.S.C. § 1617 (1976). H.R. Rep. No. 1434, *supra* note 11, at 21-22.

30. Other laws, such as the Back Pay Act, 5 U.S.C. §§ 7701(g), 5596(b)(1)(A)(ii) (1976), provide for the award of attorneys' fees in administrative proceedings, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1976), has been interpreted to permit attorneys' fee awards for administrative proceedings, New York Gaslight Club v. Carey, 417 U.S. 54 (1980), although the question of whether these Title VII awards may be made by agencies themselves or only by courts was not at issue. For a discussion of case law on these questions, see Cohen, *supra* note 6, at 31-34. Generally, however, awards of attorneys' fees had not been widely available in administrative proceedings before passage of the Act. While some agencies have funded public participation programs, *see, e.g.*, 15 U.S.C. § 57a(h) (1976) (Federal Trade Commission), these differ substantially in purpose and approach from statutes authorizing the award of attorneys' fees to prevailing litigants. For discussion of public participation programs, see Study on Federal Regulation Pursuant to S. Res. 71, Vol. III, Public Participation in Regulatory Agency Proceedings, Senate Committee on Governmental Affairs, S. Doc. No. 71, 95th Cong., 1st Sess. (1977).

The purpose of this article is to provide some initial guidance to those who seek to use or implement the Act on the more challenging issues likely to confront them—applying the eligibility standards, interpreting the "substantially justified" test, and determining what is included in the fees and expenses recoverable under the Act. Separate sections deal with the unique problems of implementing the Act in administrative proceedings and with the Act's convoluted provisions on the source of funds for the payment of awards. Because these issues should be viewed against the larger background of attorneys' fee awards in the United States courts, the historical context of the American rule and its exceptions will also be discussed.

II. The American Rule and Its Exceptions

The precise origins of the American rule requiring litigants to bear their own attorneys' fees remain shrouded in history.[31] The rule was first invoked by the United States Supreme Court in 1796, in *Arcambel v. Wiseman*.[32] Rather than offer reasons for the rule, the Court simply noted that it was generally in use in the courts of this country.[33] Two major arguments have been marshalled in support of the rule: first, that litigation is uncertain and parties, especially the poor, should not be discouraged from or penalized for participating in lawsuits; second, that litigating the question of what is a reasonable attorney's fee would be burdensome and time consuming for the courts.[34] Although some commentators have criticized the rule,[35] it has continued generally in force to the present.[36]

Exceptions to the rule have developed, however, both at common law and in statutes. When a party has acted in bad faith, either in the conduct that led to a lawsuit or in the litiga-

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31. *See* Dawson, *Lawyers and Involuntary Clients: Attorneys Fees From Funds*, 87 Harv. L. Rev. 1597, 1598 (1974) [hereinafter cited as *Fees from Funds*].

32. 3 U.S. (3 Dall.) 306 (1796).

33. *Id.*

34. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

35. *See, e.g.*, Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 Iowa L. Rev. 75 (1963).

36. For a review of the history of the American rule and its exceptions, see Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 247-63 (1975). *See also* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-19 (1967).

tion itself, a court may award attorneys' fees to his opponent.[37] Similarly, a court may award attorneys' fees against a party who has willfully violated a court order.[38] The purposes of these fee awards are to discourage bad faith conduct and to recompense the innocent party for expenses needlessly incurred as a result of that conduct.

The other major common law exception to the American rule is the "common fund" or "common benefit" doctrine, under which a party bringing litigation that creates, increases, or protects a fund from which nonparties will benefit is entitled to receive from that fund a contribution for the attorneys' fees and other expenses of litigation.[39] The theory behind this doctrine is that those who have obtained the benefits of litigation without actively participating should not be unjustly enriched at the expense of the active parties or their counsel.[40] This "common fund" line of cases was later extended to cases involving a "common benefit," even where no fund was brought directly within the court's jurisdiction, and the fees had to be imposed on the losing party. In *Mills v. Electric Auto-Lite Co.*,[41] the Supreme Court applied the doctrine to permit recovery of fees from a corporation in a shareholders' derivative action involving a mislead-

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37. F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974) (attorneys' fees denied where bad faith not shown); Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962) (counsel fees held an element of damages in an admiralty action where defendant's failure to consider plaintiff's claim before litigation was willful); McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971) (university's failure to state reasons for termination, in accordance with recent court decision, entitled professor to attorneys' fees even though his termination was ultimately upheld). *See* Hall v. Cole, 412 U.S. 1, 15 (1973): "It is clear, however, that 'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." In Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-67 (1980), the Supreme Court held that bad faith in the conduct of the litigation could justify an award of fees against counsel for the opposing party as well as against the party itself. *See* Comment, *Awards of Attorneys' Fees Against Attorneys:* Roadway Express v. Piper, 60 B.U.L. Rev. 950 (1980). *See also* 6 J. Moore, Federal Practice ¶ 54.77[2] at 1709 (2d ed. 1972); Annot., 31 A.L.R. Fed. 833 (1977).

38. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923).

39. Boeing Co. v. Van Gemert, 444 U.S. 472 (1980); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885); Trustees v. Greenough, 105 U.S. 527 (1881). *See generally Fees from Funds, supra* note 31. This article lists numerous cases decided under the common fund doctrine. *Id.* at 1606 n.25.

40. Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980); Trustees v. Greenough, 105 U.S. 527 (1881).

41. 396 U.S. 375 (1970).

ing proxy statement, even though the benefits conferred on the shareholders were not pecuniary.[42]

Combining the "common benefit" theory of *Mills* and the policy, stated by the Supreme Court in *Newman v. Piggie Park Enterprises*,[43] of encouraging "private attorneys general" to vindicate important public rights, federal courts in the 1970's began to award attorneys' fees to prevailing plaintiffs in civil rights and other "public interest" actions,[44] regardless of whether the defendants had acted in bad faith, and regardless of whether Congress had explicitly authorized such awards, as it had in *Newman*.[45] The Supreme Court rejected this approach in *Alyeska Pipeline Service Co. v. Wilderness Society*[46] and effectively prohibited expansion of the common law exceptions to the American rule beyond the traditional bad faith and common benefit doctrines.

Alyeska cast no doubt, however, on "private attorney general" exceptions to the American rule that were created explicitly by statute. Such laws as the Clayton Act[47] had long provided for such awards, as had more recently enacted provisions including several civil rights laws.[48] Rather, the Court ruled that it is ordinarily for Congress, and not the courts, to decide when litigation should be encouraged by fee award provisions and when it should not.

To the numerous statutory exceptions to the American rule

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42. For discusson of the awards of attorneys' fees in stockholders' derivative suits, see Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 854-58 (1975) [hereinafter cited as *Public Interest Litigation*]; Note, *Attorneys' Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Reexamined*, 60 Calif. L. Rev. 164 (1972).

43. 390 U.S. 400 (1968).

44. *E.g.*, Brewer v. School Bd., 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 933, 409 U.S. 892 (1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691, 694 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972). For a discussion of these developments, see *Public Interest Litigation*, *supra* note 42, at 888-900. Cases awarding attorneys' fees to prevailing civil rights plaintiffs are cited in *id.* at 899 nn.205-17.

45. *Newman* involved Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1976), which explicitly provided for the award of attorneys' fees.

46. 421 U.S. 240 (1975).

47. 15 U.S.C. § 15 (1976).

48. *E.g.*, Titles II, III and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3, 2000b-1, 2000e-5(k) (1976); Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1976); Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(e) (1976).

that existed before *Alyeska*,[49] Congress added new ones after the decision,[50] most notably the Civil Rights Attorney's Fees Awards Act of 1976.[51] This law was designed to reduce the impact of *Alyeska* by authorizing awards of fees in many of the types of cases in which that case had prohibited them.[52] While the terms of these statutes and the reasons they provide for fee awards vary considerably, the major fee provisions generally appear to be motivated by the private attorney general concept. In the judgment of Congress, the rights to be vindicated promote the public interest whether or not the litigant also realizes private benefits.[53] While some of these statutes permit either party to receive attorneys' fees,[54] the standards for making awards to defendants are generally much stricter than those for awards to plaintiffs. Ordinarily, the plaintiff's suit must have been patently unreasonable or frivolous, so that the defendant has been unfairly penalized by having to defend against it.[55] The reasons for making these awards are similar to those for awards under the common law bad faith exception.

III. Purposes of the Equal Access to Justice Act

Like other fee-shifting statutes, the Equal Access to Justice Act springs from concern that imposing litigation costs on certain parties will deter them from vindicating their rights in court. Unlike those other statutes, however, the Act does not fo-

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49. *See* Cohen, *supra* note 6, at 82-104, for a list of federal statutory provisions authorizing the award of attorneys' fees.

50. *E.g.*, Civil Service Reform Act of 1978, 5 U.S.C. §§ 5596(b)(1), 7701(g) (1976); Ethics in Government Act of 1978, 2 U.S.C. § 288i(d) (1976); Right to Financial Privacy Act of 1978, 12 U.S.C. § 3417(a) (1976). *See* Cohen, *supra* note 6, at 82-104.

51. 42 U.S.C. § 1988 (1976).

52. S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976).

53. In antitrust cases, for example, plaintiffs may receive attorneys' fees in addition to treble damages in exchange for the public service of bringing to light violations of the antitrust laws. *See also* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1976).

54. *E.g.*, Titles II and VII of the Civil Rights Act of 1964, *supra* note 48.

55. These different standards for awards have been created by the courts in civil rights cases; the statutes involved in these cases generally do not distinguish between plaintiffs and defendants. *Compare* Newman v. Piggie Park Enters., 390 U.S. 400 (1968) (fees should be awarded to prevailing plaintiffs under Civil Rights Act attorneys' fees provision (Title II) unless special circumstances make an award unjust) *with* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (fees should not be awarded to prevailing defendants under Civil Rights Act attorneys' fees provison (Title VII) unless plaintiff's case was unreasonable or frivolous).

cus on the nature or significance of the particular interests involved in the litigation, except to the extent that certain types of proceedings are not included within its coverage.[56] Although the Act was apparently intended primarily to aid litigants who prevail over the government in civil enforcement proceedings and actions for review of agency orders,[57] as enacted it applies to a broad range of agency proceedings and to all types of non-tort civil court actions to which the United States is a party. While litigation between government agencies and private parties will often resolve legal issues of concern to others who are not parties to the litigation (for example, by clarifying the meaning or scope of a regulatory requirement),[58] the Act applies even when the interests represented by the prevailing party are purely private.[59] The Act also makes no distinction between prevailing plaintiffs and prevailing defendants, although Congress apparently contemplated that its benefits would accrue primarily to those forced to litigate in order to "defend" themselves against unreasonable governmental action.[60]

In contrast to other fee-shifting statutes, the Act concerns itself with the status and means of the parties involved in the case: the prevailing party must be an individual or a small entity, and the party over which it prevails must be the federal government or one of its agencies. Because of the government's vast resources and the presumably limited resources of the small entities on the other side, litigation involving these parties presents an inherent risk of unfairness. Congress determined that the cost of litigation might deter these small parties from contesting government action, even when they firmly believed themselves to be in the right.[61]

Moreover, Congress sought to achieve other goals through the Equal Access to Justice Act that bear no resemblance what-

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56. For example, civil tort actions are not covered. 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1980).

57. *See* H.R. Rep. No. 1418, *supra* note 10, at 9-10; S. Rep. No. 253, *supra* note 10, at 5; 126 Cong. Rec. S13690 (daily ed. Sept. 26, 1980) (statement of Sen. DeConcini).

58. *See* H.R. Rep. No. 1418, *supra* note 10, at 10; S. Rep. No. 253, *supra* note 10, at 5.

59. For example, the Act applies to federal contract litigation in the Court of Claims, in which both the United States and the other party are pursuing essentially "private" interests.

60. *See* Title II of Pub. L. No. 96-481, § 202, 94 Stat. 2325 (1980).

61. *Id.* § 202(a), 94 Stat. 2325 (1980).

soever to the purposes of other fee-shifting statutes. The Act's legislative history makes clear that Congress viewed the Act as a general regulatory reform measure as well as a mechanism for helping small litigants to vindicate their rights.[62] Concerned about what it perceived as abuse of authority by federal agencies, especially with respect to small businesses, Congress imposed the risk of a fee award as an incentive for agencies to police their own enforcement and other litigation activities more rigorously, so that only sound, well-prepared cases would be initiated or litigated.[63] In addition, the Act is designed to discourage agencies from "targeting" their enforcement efforts at smaller businesses that are least able to defend themselves in the hope of obtaining settlements or victories more easily.[64]

IV. Implementation of the Act in Agency Proceedings

While the federal courts have some experience with awarding attorneys' fees, this is a new task for most federal agencies.[65] In addition to learning how to deal with the substantive questions under the Equal Access to Justice Act, agencies must adapt their procedures to this new type of responsibility. Although Congress, recognizing that agencies might face some special challenges in implementing the Act, explicitly directed them to "establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses,"[66] it failed to provide express guidance on a number of difficult questions that arise when the Act is applied in an agency context.

A. Adoption of Uniform Procedures

At the outset, questions arise about the extent to which

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62. [T]he Government with its greater resources and expertise can in effect coerce compliance with its position. . . . This kind of truncated justice undermines the integrity of the decisionmaking process. . . .

. . .

An adjudication or civil action provides a concrete, adversarial test of Government regulation and thereby insures the legitimacy and fairness of the law.

H.R. Rep. No. 1418, *supra* note 10, at 10. *See also* S. Rep. No. 253, *supra* note 10, at 5.

63. *See, e.g.*, 126 Cong. Rec. S14215 (daily ed. Oct. 1, 1980) (statement of Sen. Domenici).

64. H.R. Rep. No. 1418, *supra* note 10, at 10; S. Rep. No. 253, *supra* note 10, at 5.

65. *See* note 30 *supra*.

66. 5 U.S.C. § 504(c)(1) (Supp. IV 1980).

Congress intended agencies to interpret the Act in the process of developing procedures to implement it. Congress directed agencies to consult with the Chairman of the Administrative Conference of the United States (ACUS)[67] before establishing procedures. While the legislative history is silent on the matter, there are two probable reasons for this requirement. First, consultation affords ACUS an opportunity to promote the uniformity referred to in the statute.[68] Second, since agencies will have to make awards against themselves, they might tend to adopt restrictive or cumbersome procedures to discourage applicants; ACUS conducts no proceedings covered by the Act, and thus is a neutral source of expertise and guidance for agency implementation.

ACUS approached the consultation assignment by issuing model regulations to implement the Equal Access to Justice Act.[69] In addition to prescribing the contents of an application for fees and expenses and the procedures for processing an application, the model regulations include some interpretations of the basic statutory standards—the eligibility requirements, the "substantially justified" standard, and the meaning of "reason-

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67. *Id.* The Administrative Conference of the United States is a permanent, independent federal agency which recommends improvements in administrative procedure to Congress, the President, and federal agencies. The Conference consists of 91 members, including a Chairman and Council appointed by the President, 44 designees from federal agencies, and 36 members appointed by the Chairman from outside the government. All but the chairman serve on a part-time, uncompensated basis. The Office of the Chairman comprises the small paid staff of the Conference. While much of the work of the Office of the Chairman concerns formal recommendations to be considered by the Conference, the Office is sometimes assigned responsibilities independent of the Conference. This is the case with the Equal Access to Justice Act, which refers to the Chairman of the Conference rather than to the Conference itself. Thus the materials and opinions cited in this article are those of the Chairman and staff, and have not been ratified or considered by the Conference itself. For convenience, the Office of the Chairman of the Administrative Conference will hereinafter be referred to as "ACUS."

68. The reference to "uniform procedures" can be read to mean that procedures should be uniform for all covered proceedings at each particular agency, rather than government-wide; ACUS concluded, however, that government-wide uniformity was intended. Office of the Chairman, Administrative Conference of the United States, Equal Access to Justice Act: Agency Implementation—Model Rules, 46 Fed. Reg. 32,900 (June 25, 1981) [hereinafter cited as Model Rules]. This approach should reduce the confusion and inefficiency that would result from procedures and interpretations that vary widely from agency to agency.

69. *Id.* ACUS first published draft model rules for comment, Office of the Chairman, Administrative Conference of the United States, Implementation of the Equal Access to Justice Act—Draft Model Rules, 46 Fed. Reg. 15,895 (March 10, 1981) [hereinafter cited as Draft Model Rules].

able attorney fees."

While most agencies have generally followed the ACUS model,[70] a few have adopted regulations that differ in significant respects.[71] The Justice Department in particular contended that the interpretive provisions of the model regulations exceed the authority granted agencies by Congress, which extends only to the establishment of "procedures."[72] Citing the Conference Report's characterization of the provision as one directing agencies to adopt "uniform implementing regulations,"[73] ACUS disagreed with the Justice Department's view: "In order to administer a statute effectively, an agency must of necessity define certain terms and make initial interpretations of the statutory provisions, and the Act, in our view, provides ample authority for agencies to adopt such rules."[74]

Agencies will have to deal with the difficulties of interpreting the Act, whether they do so on a case-by-case basis or in implementing regulations which are issued after public notice and comment. The Act's reference to "procedures," as well as the fact that many separate agencies must adopt rules, should properly lead a reviewing court to defer to an agency's statutory interpretations to a lesser degree than it might in other circumstances; this should not, however, affect the agency's authority to make interpretations by rule in the first instance for the guidance of the public.

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70. *See, e.g.*, 17 C.F.R. Pt. 148, 46 Fed. Reg. 57,669 (Nov. 25, 1981) (Commodity Futures Trading Comm'n); 19 C.F.R. Pt. 212, 46 Fed. Reg. 56,780 (Nov. 19, 1981) (International Trade Comm'n); 49 C.F.R. Pt. 6, 46 Fed. Reg. 49,878 (Oct. 8, 1981) (Department of Transportation); 5 C.F.R. Pt. 2430, 46 Fed. Reg. 48,623 (Oct. 2, 1981) (Federal Labor Relations Authority); 29 C.F.R. Pt. 2204, 46 Fed. Reg. 48,078 (Sept. 30, 1981) (Occupational Safety and Health Review Comm'n); 29 C.F.R. Pt. 102, 46 Fed. Reg. 48,086 (Sept. 20, 1981) (National Labor Relations Board); 49 C.F.R. Pt. 826, 46 Fed. Reg. 48,208 (Oct. 1, 1981) (National Transportation Safety Board); 49 C.F.R. Pt. 1016, 46 Fed. Reg. 41,825 (Proposed Aug. 18, 1981) (Interstate Commerce Comm'n).

71. *See* 31 C.F.R. Pt. 6, 46 Fed. Reg. 53,025 (Oct. 28, 1981) (Treasury Department); 14 C.F.R. Pt. 373, 46 Fed. Reg. 51,375 (Oct. 20, 1981) (Civil Aeronautics Board); 28 C.F.R. Pt. 24, 46 Fed. Reg. 48,921 (Oct. 5, 1981) (Justice Department).

72. *See* Letter from Edward C. Schmultz, Deputy Attorney General (May 12, 1981) (comments of the Justice Department on Draft Model Rules) (on file at ACUS).

73. H.R. Rep. No. 1434, *supra* note 11, at 23.

74. Model Rules, *supra* note 68, at 32,902.

B. Agency Proceedings Covered by the Act

The legislative history offers two reasons for Congress' decision to include "adversary adjudications" and not other administrative proceedings within the Act's coverage:

> to narrow the scope of the bill in order to make its costs acceptable . . . [and] to limit the award of fees to situations where participants have a concrete interest at stake but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies.[75]

Congress apparently concluded that rulemaking proceedings, informal investigations, and other such agency proceedings do not involve either a concrete enough interest or enough time and expense to justify making fee awards available.[76] Thus it is clear what types of cases Congress had in mind when enacting the legislation. Questions remain, however, about what specific proceedings are actually covered by the Act.

The question of which administrative adjudications are "under section 554" of the Administrative Procedure Act, for example, has proven challenging to agencies. Section 554 applies to agency proceedings in which a formal, on-the-record hearing is required by statute, but sometimes subtle questions of statutory analysis must be answered to determine whether a particular hearing requirement falls within the section. Some agencies sought guidance from ACUS on whether particular proceedings are covered by the Act; however, since these questions concern primarily the interpretation of particular agencies' governing statutes, ACUS decided that those agencies were better qualified

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75. H.R. Rep. No. 1418, *supra* note 10, at 14; S. Rep. No. 253, *supra* note 10, at 15-16.

76. An additional reason for this decision can be inferred from the fact that the word "adversary" was added to the legislation, in part in order to exclude disability proceedings before the Social Security Administration from the Act. *See* Transcript, House Committee on the Judiciary Markup on S. 265, Equal Access to Justice Act, at 34 (Sept. 24, 1980, on file with the Committee). These proceedings do not involve agency staff in an advocacy role at the agency level. *See* 20 C.F.R. § 422.130 (1981). Congress apparently wished to limit the Act to proceedings in which the private party is litigating against, and not just before, the federal government. This limitation comports with the Act's underlying premises that the government as a litigant (not as a deciding body) may have an unfair advantage over small entities and that the risk of attorneys' fee awards will ensure that government litigators scrutinize their cases carefully before bringing them.

to make the necessary determinations.[77]

ACUS did express an opinion that one category of administrative proceedings—those before agency boards of contract appeals—is probably not covered by the Act.[78] The legislative history of the Contract Disputes Act of 1978 makes clear Congress' belief that section 554 of the APA does not apply to contract appeals proceedings.[79] Because agencies need not establish a contract appeals board, on-the-record administrative hearings are not required by statute. On the other hand, the Contract Disputes Act authorizes boards of contract appeals to grant any type of relief that the Court of Claims may grant;[80] since the Court of Claims may award attorneys' fees under the Equal Access to Justice Act, proponents of the theory that contract appeals boards can award fees may contend that such awards fall within the "relief" mentioned in the Contract Disputes Act.[81]

This argument seems unpersuasive, however, since the Equal Access to Justice Act expressly applies only to adjudications under section 554 of the APA. Section 204 of the Act and its legislative history also suggests that fee awards may not be made in board of contract appeals proceedings. One provision of section 204 states that a court entertaining an action for review of an adversary adjudication covered by the Act *or* of a contract appeals proceeding may award fees and expenses for the administrative proceeding as well as the review action.[82] The House committee report explains that this provision does not permit litigants to seek review of contract appeals decisions solely to receive a fee award.[83] Neither the separate reference to contract appeals proceedings nor the statement in the House report would have been logical or necessary if proceedings before boards of contract appeals were covered adjudications in which fees and expenses could be awarded.

Another problematic class of administrative proceedings consists of those that are initiated by third parties in which the

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77. Model Rules, *supra* note 68, at 32,901-02.
78. *Id.*
79. S. Rep. No. 1118, 95th Cong., 2d Sess. 7 (1978).
80. 41 U.S.C. § 607(d) (Supp. IV 1980).
81. *See* 901 Federal Contracts Reporter (BNA) A-17 (Oct. 5, 1981).
82. 28 U.S.C. § 2412(d)(3) (Supp. IV 1980).
83. H.R. Rep. No. 1418, *supra* note 10, at 18.

agency nevertheless takes a position. In some cases the agency litigators' main role is to help develop a complete record, taking a formal position late in the proceeding.[84] Although third-party proceedings do not seem to be the type of cases with which Congress was most concerned in enacting the legislation, the Act by its terms does apply to them. The Act applies to court cases only if they are brought "by or against" the United States,[85] but no similar language appears in the sections of the Act applicable to agency proceedings.

When an agency participates actively on one side or the other of a case from the start, or when approval from an agency enforcement official is necessary before a private party can pursue its case, awarding fees against an agency in a case involving two private parties may be just as appropriate as an award in a case involving only the agency and one other party. In some instances, however, the agency may do no more than file a brief or position paper near the end of the proceeding; here, charging the agency for fees generated primarily by litigation between the two private parties seems unfair. A reasonable approach to these proceedings would be to consider the degree of the agency's involvement in the case and the nature of its statutory obligations (*e.g.*, does a statutory provision require agency personnel to intervene in proceedings between private parties to present a "public interest" position) in determining whether the proceeding is "adversary," whether the party has prevailed over the agency as well as the other private party, and whether an award against the agency is appropriate.

A third class of agency adjudications, though clearly under section 554 of the APA, may prove especially troublesome. In these cases, one agency participates in proceedings before another agency. Sometimes one agency will intervene in proceedings in which the presiding agency is also represented by counsel in a litigating role; the Department of Justice, for example, may intervene in proceedings before other agencies that involve anti-

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84. *See, e.g.*, 19 C.F.R. Pt. 210 (1981), which contains procedures for International Trade Commission investigations of unfair import trade practices. A Commission investigative attorney is a party to the proceeding and may seek discovery and file documents; the rules do not require this attorney to file a pleading taking a position at any particular time, however.

85. 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1980).

trust issues.[86] In another class of cases, the presiding agency has no litigating staff and hears only proceedings brought by other agencies. For example, the Occupational Safety and Health Review Commission and the Federal Mining Safety and Health Review Commission hear cases in which the United States is represented by the Labor Department;[87] similarly, the National Transportation Safety Board hears appeals from license revocation decisions of the Federal Aviation Administration,[88] and FAA counsel defend that agency's position.

Some agencies, including the Justice Department, have contended that the Act does not authorize presiding agencies to make awards against other agencies, noting that the Act speaks in terms of the adjudicative officer of "the agency" making findings about the position of "the agency."[89] As ACUS pointed out, however, the term "adversary adjudication" is defined to include proceedings in which the position of the United States is represented, not just those in which the position of the presiding agency is represented, and the Act provides for payment of awards by "any agency over which the party prevails," rather than by "the agency."[90] ACUS also observed that congressional debate on the Act included frequent references to occupational safety and health proceedings, which involve separate litigating and deciding agencies; Congress therefore apparently believed that the Act would apply to these proceedings.[91]

The lack of any definitive indication in the Act or its legislative history of whether agencies may award attorneys' fees against other agencies appearing before them, coupled with the evidence that Congress intended to include occupational safety and health proceedings within the Act's coverage, suggests that Congress simply did not remember that some administrative proceedings involve more than one agency. If one considers only the language of the statute itself, the Justice Department's position is somewhat stronger than that of ACUS. However, it seems

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86. 15 U.S.C. § 21 (1976).

87. 29 U.S.C. § 659 (1976); 30 U.S.C. § 815 (1976).

88. 49 U.S.C. § 1903(a)(9) (1976).

89. *See* Comments of the Justice Department on Draft Model Rules, *supra* note 72.

90. Model Rules, *supra* note 68, at 32,906.

91. *Id.* (citing statement of Sen. DeConcini, 126 Cong. Rec. S13690 (daily ed. Sept. 26, 1980)); 126 Cong. Rec. H10229 (daily ed. Oct. 1, 1980) (statement of Rep. Symms).

more consistent with the remedial purposes of the Act and with the evidence, albeit limited, of the proceedings Congress intended to cover to construe the Act broadly, as ACUS has. The Act should be interpreted to permit the award of attorneys' fees by one agency against another.

C. *Agency Review of Adjudicative Officers' Decisions*

Another challenging problem considered by ACUS in developing model rules to implement the Act concerns agency review of adjudicative officers' decisions on applications for fees and expenses. The Act assigns to the adjudicative officer the primary role in considering applications for fees and expenses, stating that the officer shall decide whether the agency's position was substantially justified or whether special circumstances make an award unjust,[92] as well as whether the award should be reduced or denied because the party has unduly and unreasonably protracted the proceeding.[93]

The House Judiciary Committee Report, explaining the first appearance of the "adjudicative officer" in the bill (the version passed by the Senate in 1979 had specified that the agency would make these determinations), stated that the purpose of the change was "[t]o have an 'adjudicative officer' making the fee determination."[94] Apparently, then, all of the issues necessary to disposition of an application for fees and expenses are to be determined, at least in the first instance, by the adjudicative officer.

According to the Act, this officer is "the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication."[95] Ordinarily, this would be an administrative law judge whose initial decisions in proceedings under section 554 of the APA would be reviewable by the agency under section 557(b), which provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." The

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92. 5 U.S.C. § 504(a)(1) (Supp. IV 1980).
93. 5 U.S.C. § 504(a)(3) (Supp. IV 1980).
94. H.R. Rep. No. 1418, *supra* note 10, at 12.
95. 5 U.S.C. § 504(b)(1)(D) (Supp. IV 1980).

Equal Access to Justice Act, however, makes no reference to agency review of adjudicative officers' decisions, and while the fee determination is made in the context of a proceeding under section 554 of the APA, there is no indication that the fee determination itself must be made on the basis of an on-the-record hearing. The Act's only other reference to the adjudicative officer's decision states that the decision "shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor."[96] The final decision referred to may be the final decision on an application for fees or the final decision in the underlying proceeding. If the latter, this requirement can be read to imply that the adjudicative officer's decision on the fee application is a final one, though the language of the statute by no means clearly mandates this reading. Thus the Act leaves open the question of whether the agency is free to review the adjudicative officer's decision on a fee application.

How the question should be resolved depends on what conclusions one draws about Congress' reasons for substituting the adjudicative officer for the agency in the first place. The substitution occurred in a markup session held by the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee; the subcommittee may have believed that administrative law judges, who have some measure of independence from their agencies and who are accustomed to deciding between positions advanced by agency staff and positions advanced by outside parties, would be less likely to be biased in favor of the agency than other agency personnel.[97] In light of this concern, the Act's reference to the adjudicative officer can be interpreted in two ways: first, the intent may have been to judicialize the procedure, so that the applicant would have a full opportunity to make its case before a relatively unbiased officer familiar with the underlying proceeding; alternatively, the purpose may have been primarily to leave the final decision with the unbiased individual, rather than with the agency as an entity, which might be less likely than the adjudicative officer to find its own litigating staff's position unreasona-

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96. 5 U.S.C. § 504(a)(3) (Supp. IV 1980).

97. *See Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the House Judiciary Committee, Subcommittee on Courts, Civil Liberties and the Administration of Justice*, 96th Cong., 2d Sess. 62 (1980).

ble. Agency review of adjudicative officers' decisions would defeat the second purpose; it is not inconsistent with the first purpose, however.

The resolution of this issue reached in the ACUS model rules was based largely on practical considerations. These rules marked the concern of several agencies that permitting no review or only limited review of adjudicative officers' decisions would retard the development of uniform legal standards and promote inconsistent award decisions. ACUS rejected the possibility that Congress intended to take an action as "unusual and potentially impractical"[98] as barring agency reviews. Most agencies have followed the model rules' lead on this issue.[99] Agencies should, however, remember the reason for including the adjudicative officer when reviewing fee determinations. If an agency cavalierly disregards an adjudicative officer's findings in favor of an applicant or otherwise appears to show bias against applicants, a reviewing court may conclude that the Act's purposes cannot be achieved unless agency review is prohibited.

V. ELIGIBILITY

The Act's eligibility standards based on size and financial status distinguish it markedly from other statutes providing for the award of attorneys' fees to prevailing litigants. The standards—a net worth of $1 million or less for individuals and a net worth of $5 million or less and 500 or fewer employees for most businesses, organizations, and other entities, as of the date the proceeding was initiated,[100]—are sufficiently broad so that many litigants will fall within them. Even for clearly eligible applicants, however, demonstrating eligibility[101] will present an addi-

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98. Model Rules, *supra* note 68, at 32,910.

99. *See, e.g.*, 46 Fed. Reg. 53,025, 53,027-28 (1981) (to be codified in 31 C.F.R. § 6.15) (Treasury Department); 46 Fed. Reg. 48,910, 48,913 (1981) (to be codified in 16 C.F.R. § 3.83(h)) (Federal Trade Commission); 46 Fed. Reg. 48,086, 48,089 (1981) (to be codified in 29 C.F.R. § 102.154) (National Labor Relations Board). *But see* 46 Fed. Reg. 48,921, 48,925 (1981) (to be codified in 28 C.F.R. § 24.307), providing that, in Justice Department proceedings, the adjudicative officer's decision will be reviewed by the agency "to the extent permitted by law."

100. 5 U.S.C. § 504(b)(1)(B) (Supp. IV 1980); 28 U.S.C. § 2412(d)(2)(B) (Supp. IV 1980).

101. The Act requires a party seeking an award to submit an application showing that it is eligible for an award. 5 U.S.C. § 504(a)(2) (Supp. IV 1980); 28 U.S.C. § 2412(d)(1)(B) (Supp. IV 1980). In general, the party seeking an award has the burden of

tional practical obstacle to receiving an award. For applicants near the eligibility limits, particularly businesses, showing eligibility may prove especially challenging, involving disputes over issues such as the proper method of determining net worth.

Ideally, the eligibility showing required of applicants for attorneys' fee awards should provide sufficient information about net worth without unduly burdening those applicants who are clearly eligible. The approach proposed by ACUS in its model rules for agency proceedings was to permit applicants themselves to choose the format of the net worth showing, requiring only that it provide "full disclosure of the applicant's . . . assets and liabilities and is sufficient to determine whether the applicant qualifies."[102] The model rules also provide that the adjudicative officer can request more information from an applicant, on his or her own motion or at the behest of agency litigators opposing the grant of an award.[103]

The aim of this scheme is to leave agencies flexibility to tailor the evidentiary requirements to the circumstances of individual applicants. A simple balance sheet, verified by the applicant, would probably be adequate to show the net worth of an individual of modest means. A sophisticated, detailed showing should be required from applicants who are near the eligibility limits, especially businesses and organizations. While the expense of proving net worth should be kept to a minimum (Congress presumably did not intend to require complex litigation over eligibility as a prerequisite for obtaining an award), there may be some instances, where serious questions exist about eligibility, in which audited statements would be appropriate.

In adopting their own rules to implement the Act, agencies have generally followed the model rules' approach to the net worth showing.[104] Whether they will apply the rule with the in-

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proof on all issues except for that of substantial justification, discussed in section VI *infra*.

102. Model Rules, *supra* note 68, at 32,913, § 0.202(a).

103. *Id.* at 32,913, § 0.202(a), and 32,914, § 0.306.

104. *See, e.g.*, proposed 46 Fed. Reg. 53,189, 53,193 (1981) (to be codified in 10 C.F.R. § 2.1011(a)) (Nuclear Regulatory Commission); 31 C.F.R. § 6.9(b), 46 Fed. Reg. 53,025, 53,027 (1981) (to be codified in 31 C.F.R. § 6.9(b)) (Treasury Department); 46 Fed. Reg. 48,921-48,924 (1981) (to be codified in 28 C.F.R. § 24.202(a)) (Justice Department); 46 Fed. Reg. 45,943, 45,946 (1981) (to be codified in 39 C.F.R. § 960.10(a)) (Postal Service).

tended flexibility or develop more restrictive evidentiary requirements as they decide individual cases remains to be seen.

While courts will not, of course, be applying regulations to Equal Access to Justice cases that come before them, it seems probable that they will respond with similar flexibility to the question of what evidence is required to demonstrate net worth In both judicial and administrative proceedings, the extent to which, and the evidence with which, the agency challenges eligibility will be important factors in resolving this question.

When applicants for awards approach the limits of eligibility, courts and agencies will face some additional challenges. The eligibility of such an applicant may depend on how "net worth" is determined, but the Act's legislative history provides few clues to congressional intent. Committee reports define net worth as total assets less total liabilities[105]—a straightforward and apparently workable definition. But there are numerous ways of measuring assets and liabilities, depending on the purpose for which the calculation is made. How should assets like goodwill be treated, for example? Does the conventional treatment of debt as a liability and stockholders' equity as part of net worth unfairly permit heavily debt-financed businesses to receive awards of fees when equity-financed businesses of approximately the same size cannot? What standard should be used to value assets—market value, acquisition cost, par value for securities?

Only on the last of these questions does the legislative history of the Act provide any guidance. The committee reports state that the acquisition cost of assets should be used rather than their fair market value.[106] While this direction is not explained, there are at least two possible reasons for it. First, acquisition cost will often be easier to prove than market value, which might require expert appraisals or similar evidence, particularly since the relevant market value will be that on the date the proceeding began and not at the time the evidence of net worth is presented. Second, in an inflationary economy, the acquisition cost approach will enable more parties to meet the Act's eligibility standards.

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105. H.R. Rep. No. 1418, *supra* note 10, at 15; S. Rep. No. 253, *supra* note 10, at 17.

106. H.R. Rep. No. 1418, *supra* note 10, at 15; S. Rep. No. 253, *supra* note 10, at 17.

There are two situations, however, in which the purposes of the Act would be better served if this particular bit of legislative history were not followed. First, when an applicant's net worth showing indicates that it falls far below the applicable ceiling and is based on properly documented, credible evidence, a court or agency should not burden the applicants by insisting that the showing be stated solely in terms of acquisition cost. Second, some applicants for awards may be disadvantaged by the acquisition cost approach because, for example, they have made poor investments in the stock market. Where these parties can demonstrate that the market value of their assets when the proceeding began was significantly lower than the acquisition cost, they should be permitted to use market value. In this way, eligibility will turn on the actual financial condition of the party, as it should, rather than on a technicality.

This issue of actual financial condition as opposed to technical eligibility raises an important question about eligibility of businesses under the Act: how should one treat companies that are subsidiaries or affiliates of other companies, or are commonly held? The Act is silent on this problem. The Act's purpose clause and legislative history, however, point out that the Act is intended to benefit parties that may lack the resources to litigate effectively against the United States.[107] Parties that meet the eligibility standards only because of technicalities of legal or corporate form, while having access to a large pool of resources from parent or affiliated companies, do not fall within this group of intended beneficiaries; and the Act's purposes will best be achieved if these parties are excluded from eligibility. To read the eligibility provisions of the statute to exclude such parties, of course, adds a substantial amount to their explicit terms. Moreover, there is no source of guidance as to where to draw the line between excludable "affiliates" and eligible parties.

An alternative approach that would give courts and agencies the authority to reach outcomes consistent with the Act's terms and purposes is to interpret the "special circumstances" clause to permit the denial of awards to applicants that would not be eligible if their net worth or number of employees were aggregated with those of affiliated entities. While ability to pay coun-

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107. Pub. L. No. 96-481, tit. II, § 202; H.R. Rep. No. 1418, *supra* note 10, at 6; S. Rep. No. 253, *supra* note 10, at 1.

sel has been held not to be a "special circumstance" making a fee award unjust under other fee-shifting statutes,[108] the explicit concern of this legislation with the parties' ability to bear the expense of litigation argues for a different result under the Act.

Use of the "special circumstances" clause also permits courts and agencies to deal flexibly with the facts of individual cases in deciding whether a party is eligible for an award of fees. The ACUS model rules employ such an approach, attempting to prescribe flexibility while also providing clear guidance to applicants as to when they risk aggregated treatment with other entities. The model rules create a category of situations in which businesses would be assumed to be affiliated and would have to report net worth in an aggregated form; however, the rules preserve the authority of the adjudicative officer to determine from particular circumstances that affiliated treatment of applicants outside the category, or unaffiliated treatment of some applicants within it, is warranted.[109] The test of the model rules turns on ownership or control of a majority interest of another entity, whether the applicant for an award is the controlling entity or the controlled entity. When the applicant holds less than majority interests in other entities, these will show up in net worth as assets. When other entities hold less than majority interests in an applicant, these will not necessarily appear on the balance sheet; ACUS concluded, however, that no bright line rule for use by all agencies in all proceedings could define which situations should constitute "control" and which should not.[110]

Finally, the courts may have to contend with an unusual technical problem in applying the eligibility provisions of the Act. As enacted, it provides that parties may be eligible for awards in court proceedings if they meet either the net worth standard or the number of employees standard, though parties to administrative proceedings must meet both standards.[111] The difference appears to have been inadvertent, and the Conference Report on the legislation indicates that applicants in both types

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108. *E.g.*, International Oceanic Enters. v. Menton, 614 F.2d 502 (5th Cir. 1980).

109. Model Rules, *supra* note 68, at 32,912, § 0.104(f).

110. *Id.* at 32,903.

111. 5 U.S.C. § 504(b)(1)(B) (Supp. IV 1980) states that the term "party" excludes those that exceed the net worth limits and those that exceed the ceiling on number of employees; 28 U.S.C. § 2412(d)(2)(B) (Supp. IV 1980) states that the term includes those within the net worth limits or those within the ceiling on number of employees.

of proceedings are to meet both eligibility standards.[112] Amendments to the Act included in the House-passed version of the 1981 budget reconciliation legislation would have reconciled the two provisions by requiring all applicants to meet both standards.[113] However, these amendments were dropped in the conference on the budget legislation.[114] In view of the clear statement of intent in the Conference Report, the courts should probably require applicants to meet both eligibility standards despite the apparently contrary terms of the Act itself.

VI. The "Substantially Justified" Standard for Avoiding an Award

The Act provides that a prevailing eligible party is to receive an award of attorneys' fees and expenses "unless the court finds that the position of the United States was substantially justified."[115] Until experience in administering the Act leads courts and agencies to develop an interpretation that is accepted as authoritative, parties seeking to recover attorneys' fees will undoubtedly argue that a losing case is virtually never "substantially justified," while federal attorneys will contend that little or nothing more than lack of bad faith in conducting litigation is required to show substantial justification.

The congressional intent is apparently somewhere in the middle. The Conference Report on the Act states that "[t]he test of whether the government position is substantially justified is essentially one of reasonableness in law and fact."[116] The House and Senate Reports provide additional clues to the meaning of this standard:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been

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112. H.R. Rep. No. 1434, *supra* note 11, at 26.

113. H.R. 3982, §§ 13016-13017, passed by the House of Representatives, June 26, 1981, Cong. Rec. H4035, 97th Cong., 1st Sess.

114. *Compare* H.R. 3982, *supra* note 113, *with* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981). *See also* H.R. Rep. No. 208, Conference Report on H.R. 3982, 97th Cong., 1st Sess. (July 29, 1981).

115. 28 U.S.C. § 2412(d)(1)(A) (1981). The provision for administrative proceedings substitutes "adjudicative officer of the agency" for "court" and "agency as a party to the proceeding" for "United States." 5 U.S.C. § 504(a)(1) (Supp. IV 1980).

116. H.R. Rep. No. 1434, *supra* note 11, at 22.

> a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim has been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Governmment to establish that its decision to litigate was based on a substantial probability of prevailing.[117]

These reports also explicitly reject the standards for awards to prevailing plaintiffs and prevailing defendants under the civil rights laws.[118] Thus virtually automatic awards to prevailing parties were deemed unacceptable because they "might have a chilling effect on reasonable government enforcement efforts,"[119] while a standard proposed by the Justice Department based on the civil rights standard for prevailing defendants established in *Christiansburg Garment Co. v. EEOC*,[120] providing for awards when the prevailing party could show that the government's action was "arbitrary, frivolous, unreasonable, or groundless, or the United States continued to litigate after it clearly became so,"[121] was rejected as too restrictive.

Congress objected that the *Christiansburg*-based standard would saddle the party seeking an award with the burden of proving the government's position unreasonable. The standard used in the Act, on the other hand, provides that awards shall be made *unless* the government's position is reasonable; the legislative history makes clear that Congress intended this language to shift the burden of proof from the prevailing party to the government.[122] The ACUS model rules explicitly note this shift for the guidance of applicants, providing that: "[t]he burden of proof that an award should not be made to an eligible prevailing

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117. H.R. Rep. No. 1418, *supra* note 10, at 11. *See also* S. Rep. No. 253, *supra* note 10, at 6-7.

118. H.R. Rep. No. 1418, *supra* note 10, at 10; S. Rep. No. 253, *supra* note 10, at 6.

119. S. Rep. No. 253, *supra* note 10, at 6. *See also* H.R. Rep. No. 1418, *supra* note 10, at 13-14.

120. 434 U.S. 412 (1978).

121. H.R. Rep. No. 1418, *supra* note 10, at 14 (quoting *Christiansburg*, 434 U.S. 412, 417 (1978)).

122. H.R. Rep. No. 1434, *supra* note 11, at 22.

applicant is on the agency counsel."[123] The Justice Department and some other agencies have omitted this statement from their rules, substituting the following: "No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail."[124] Although this provision can be interpreted consistently with congressional instructions on burden of proof, applicants may believe it means that they must show that the agency's position was unjustified. Moreover, this verson of the rule ignores the direction of the committee reports that "[i]t is intended that the rules [adopted by the agencies] specify that an award will be made unless the government comes forward with a showing that its case was substantially justified or special circumstances make an award unjust."[125]

In addition to the shifted burden of proof, Congress evidently perceived a substantive difference between the *Christiansburg* standard for awarding attorneys' fees and the substantially justified standard. The House and Senate Reports describe both the standard and burden of proof in the Act as "an acceptable middle ground."[126] In a floor statement during debate on Senate Bill 265, Senator DeConcini described the proposed Justice Department standard as "too narrow to overcome the strong disincentives to the exercise of legal rights" and interpreted it to require "that the Government action had no legal or factual basis and that it was completely without foundation."[127] By contrast, the definition of the substantially justified standard indicates that the government's position must have both a reasonable factual basis and a reasonable legal basis;[128] if either is lacking, an award can be made.

The standard was taken from Rule 37 of the Federal Rules of Civil Procedure, which governs failure to make discovery.[129] Under Rule 37(a)(4), on a motion to compel discovery by a party

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123. Model Rules, *supra* note 68, at 32,913, § 0.105(a).

124. 46 Fed. Reg. 48,921, 48,923 (1981) (to be codified in 28 C.F.R. § 24.106(a)).

125. H.R. Rep. No. 1418, *supra* note 10, at 16; S. Rep. No. 253, *supra* note 10, at 17.

126. H.R. Rep. No. 1418, *supra* note 10, at 14; S. Rep. No. 253, *supra* note 10, at 15.

127. 125 Cong. Rec. S10914 (daily ed. July 31, 1979) (statement of Sen. DeConcini).

128. H.R. Rep. No. 1434, *supra* note 11, at 22.

129. *See* H.R. Rep. No. 1418, *supra* note 10, at 13; S. Rep. No. 253, *supra* note 10, at 14.

who has failed to answer interrogatories or deposition questions or to permit inspection of documents, the court may award reasonable expenses related to the motion, including attorneys' fees, to the winning party, "unless the court finds that the [losing party's action] was substantially justified or that other circumstances make an award of expenses unjust." The standard is also included in other sections of Rule 37. Since these deal with more serious derelictions, such as failure to obey a court order compelling discovery or failure to appear for a properly scheduled deposition, the likelihood of a finding of substantial justification is low,[130] and the provisions are less apposite to the circumstances of cases under the Equal Access to Justice Act than to those of Rule 37(a)(4).

The current language of Rule 37 was adopted in 1970.[131] The notes of the Judicial Conference Advisory Committee recommending the change observed that awards of fees and expenses had seldom been made under the previous rule, which provided for such awards if the court found that the losing party's actions lacked substantial justification.[132] The purpose of the change was to encourage courts to take action against discovery abuses by clarifying that "expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court."[133] The current language has been interpreted to dictate a shift in the burden of persuasion from the party seeking an award to the party seeking to avoid one,[134] precisely the allocation of burden desired by Congress when it chose the Rule 37 language.

The Advisory Committee's notes provided the following guidance on the meaning of "substantially justified":

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130. Indeed, cases under Rules 37(b) and 37(d) often turn not on the issue of substantial justification, but on whether the party's behavior was bad enough to justify the imposition of sanctions more severe than the award of attorneys' fees. *See generally* 4A J. Moore, Federal Practice ¶¶ 37.03, 37.05 (1981).

131. 398 U.S. 977, 1002 (1970).

132. Report of the Judicial Conference of the United States (October Sess. 1969), Appendix 2, *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules*, 48 F.R.D. 487, 540 (1970) [hereinafter cited as *Explanatory Statement*].

133. *Id.*

134. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2288, at 789 (1973). *See also* Addington v. Mid-American Lines, 77 F.R.D. 750 (W.D. Mo. 1978).

> On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists.[135]

Under the discovery rules, the types of disputes that arise ordinarily involve single issues—whether the information sought is relevant to the case, or whether it is protected from discovery by some evidentiary privilege, for example. In these circumstances, it is relatively easy for a court to decide whether it believes the losing party had a colorable argument in defense of its position. In cases under the Equal Access to Justice Act, the question will be considerably more complex. Courts and agencies will have to make some assessment based on the totality of the legal and factual issues in the case, and possibly procedural and strategic aspects as well.[136]

Predictably, therefore, the case law under Rule 37(a)(4) is not extremely helpful in establishing a standard of decision for cases under the Equal Access to Justice Act. Many cases awarding fees under Rule 37(a)(4) do so without any detailed explanation of why the losing party's position lacked substantial justification.[137] Those that do explain, generally describe circumstances in which the court believes the losing party has acted only for the purpose of delay, or has totally failed to follow accepted discovery procedure.[138] Some courts, moreover, have continued to give losing parties the benefit of the doubt in deciding whether to award attorneys' fees, albeit not to the extent

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135. *Explanatory Statement*, *supra* note 132, at 540.

136. While a party should not be able to receive an award under the Act for prevailing solely on a procedural issue unless that issue disposes of the merits of the case, *cf.* Hanrahan v. Hampton, 446 U.S. 754 (1980) (per curiam), the Act directs courts and agencies to look at the government's "position" rather than its "case." Thus an agency's over-zealous use of procedural motions to delay a case or to pressure a party into settling, or its decision to press numerous claims in order to obtain a settlement on one or two claims, might figure in the determination of whether the agency's overall position was substantially justified.

137. *See, e.g.*, Liberty Leather Corp. v. Callum, 86 F.R.D. 550 (D. Mass. 1980); Bell v. Automobile Club, 80 F.R.D. 228 (E.D. Mich. 1978), *appeal dismissed*, 601 F.2d 587 (6th Cir.), *cert. denied*, 442 U.S. 918 (1979).

138. *See, e.g.*, Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392 (D. Md. 1974); Whitehouse Invs., Ltd. v. Bernstein, 51 F.R.D. 163 (S.D.N.Y. 1970).

they did before the 1970 change.[139] In *Usery v. Brandel*,[140] for example, a federal district court in Michigan declined to award attorneys' fees against a party who moved to compel discovery of information clearly protected by an "informer's privilege," stating: "[T]he most superficial reading of recent case law would have revealed the futility of the pending motion. . . . Brandel's legal argument is untenable, and his motion should not have been brought. The Court perceives, however, that the motion was raised in good faith and without guileful motive."[141] Similarly, another district court denied fees in *Ballard v. Allegheny Airlines, Inc.*[142] Although the court found that most of the defendant's objections were "completely unmeritorious" and that "plaintiff's motion should have been unnecessary,"[143] it concluded that "the present record does not provide an adequate basis for apportioning the blame."[144] A major reason articulated in support of the 1970 change in Rule 37 was to get away from the requirement of willful conduct imposed by the courts in applying the rule,[145] but in practice, courts still require something near to willfulness before allowing attorneys' fees under Rule 37(a)(4).

As courts and agencies apply these precedents to Equal Access to Justice cases, they should temper them with the clear indications in the Act's own legislative history that mere absence of bad faith or of deliberate abuse of the legal process is not enough to avoid an award of fees and expenses. Inevitably, determinations will have to be made on a case-by-case basis; because of the wide variety of legal issues and factual contexts likely to be involved in cases to which the Act applies, it is impossible to propose a rule of thumb that will be universally applicable. In general, however, the Act apparently contemplates that a prevailing party is entitled to an award beyond the obvious cases in which the United States has acted in bad faith or with the purpose of harrassing the other party. An award of at-

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139. *See* Willys Motors v. Northwest Kaiser-Willys, Inc., 18 F.R.D. 473 (D. Minn. 1956), which interprets the former rule to require unreasonable, recalcitrant, or capricious behavior to justify an award.

140. 87 F.R.D. 670 (W.D. Mich. 1980).

141. *Id.* at 685.

142. 54 F.R.D. 67 (E.D. Pa. 1972).

143. *Id.* at 70.

144. *Id.*

145. *Explanatory Statement*, *supra* note 132, at 538-39.

torneys' fees should also be made when the United States has based its case on a very tenuous legal theory.[146] In addition, an award should follow when the government has been careless in investigating and developing the facts on which its case is based, for example, when it brings an enforcement action without reasonably thorough investigation that would have shown no violation had occurred.[147] Finally, awards should be made when the government has allowed its reach to exceed its grasp significantly, bringing as many charges as possible against a party when it has a reasonable hope of substantiating only a few. Courts and agencies should apply the substantially justified standard accordingly.

VII. Fees and Other Expenses

The fees and expenses to be awarded under the Act include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees."[148] The most challenging and important question raised by this provision is what constitutes a "reasonable" fee. The size of successful applicants' recoveries under the Act will also be affected by whether attorneys' out-of-pocket expenses are separately compensable, whether fees can be recovered for time spent seeking an award of fees, and whether fees incurred before the October 1, 1981 effective date of the Act can be recovered.

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146. According to the House and Senate reports, the "special circumstances" clause of the statute protects the government when it "[advances] in good faith . . . novel but credible extentions and interpretations of the law." H.R. Rep. No. 1418, *supra* note 10, at 11; S. Rep. No. 253, *supra* note 10, at 7. When an agency's legal theory is contrary to precedent or clearly wrong, however, fees may be awarded.

147. *But see* Alspach v. District Director of Internal Revenue, No. J-81-1018 (D. Md., Nov. 27, 1981), denying recovery of fees under the Act in a case that had been filed without adequate investigation. The court ruled that the position of the United States was substantially justified, since the government did agree to dismiss the litigation when its attorney found it to be without merit. This narrow approach was rejected in Photo Data, Inc. v. Sawyer, No. 81-2435 (D.D.C. Feb. 22, 1982), where the court held that it "must scrutinize not only the government's theory in defending the legal issues raised but also the occurrences that impelled plaintiff to bring this action." This holding was based on the court's view that focusing on only a single element of the government's actions would contradict the remedial purpose of the Act.

148. 5 U.S.C. § 504(b)(1)(A) (Supp. IV 1980). The corresponding provision for judicial proceedings substitutes "court" for "agency" and eliminates the reference to "agent" fees. 28 U.S.C. § 2412(d)(2)(A) (1981).

A. Reasonable Fees

In contrast to the other fee-shifting statutes, the provisions of the Equal Access to Justice Act actually offer some guidance, albeit limited, as to how to determine a reasonable fee for the services for which an award is to be made. The Act states that

> [t]he amount of fees awarded . . . shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.[149]

The $75 ceiling on hourly rates is a striking departure from previous fee-shifting statutes, which contain no such ceilings.[150] Although the purpose of the ceiling is not discussed in the reports on the legislation, it is undoubtedly intended as a cost-saving measure. In addition, the limit reduces the incentive for potential applicants to retain high priced specialists for cases that can be handled effectively by modestly priced counsel.

Where such specialists are really necessary, the Act leaves room for an increase in the rate both in individual court cases and by rule in administrative proceedings. As a practical matter, however, the award of fees higher than $75 per hour in administrative proceedings is unlikely during the three-year duration of the Act. Agencies are understandably not eager to increase their potential liability for fees.[151] In adopting rules to implement the Act, some agencies have failed to include the ACUS model provision describing how agencies can increase the maximum hourly rates through rulemaking,[152] perhaps because they do not expect

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149. 5 U.S.C. § 504(b)(1)(A) (Supp. IV 1980). The corresponding provision for judicial proceedings substitutes "court" for "agency," eliminates the words "by regulation," and eliminates the reference to "agents." 28 U.S.C. § 2412(d)(2)(A) (Supp. IV 1980).

150. Two minor exceptions to this rule are 42 U.S.C. § 406(b)(1) (1976), providing for the award of attorneys' fees in social security benefit claims cases, up to 25% of the past-due benefits obtained in the litigation, and 38 U.S.C. § 3404(c) (1976), providing for the award of attorneys' fees in veterans' benefit claims cases, up to $10 per claim. In these cases the fees are deducted from the benefits won by the claimant.

151. It is likely that agencies will have to pay awards made against them out of their own budgets. *See* section VIII *infra*.

152. *See, e.g.*, 46 Fed. Reg. 48,120 (1981) (to be codified in 32 C.F.R. § 747.904) (National Credit Union Administration); 46 Fed. Reg. 43,431 (1981) (to be codified in 12

to be receptive to petitions for rulemaking on this subject. Moreover, agencies willing to authorize a higher rate might be discouraged by the delay inherent in the process of adopting rules after notice and comment under section 553 of the APA.[153] By contrast, the courts are permitted to make these judgments on a case-by-case basis, and are likely to face requests to increase the rate ceiling early and often. How they will respond may well depend on the skill and thoroughness of the counsel seeking and opposing the increase.

Within the $75 hourly limit, courts and agencies both must develop methods for evaluating the reasonableness of the rates sought. A key question in this process will be whether the statute's reference to "prevailing market rates" directs courts and agencies to apply standards different from those developed under existing fee-shifting statutes.

Two basic methods of determining reasonable attorneys' fees are widely used in the federal courts today: the multiple factors approach of *Johnson v. Georgia Highway Express, Inc.*,[154] first enunciated by the Fifth Circuit in 1974, and the "lodestar" theory adopted by the Third Circuit in 1973.[155] The *Johnson* approach, also followed by the Fourth Circuit,[156] requires district courts to consider twelve factors in determining a reasonable fee: the time and labor required; the novelty and difficulty of the questions; the skill necessary to provide the service; preclusion of other employment by the attorney; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the attorneys' experience, reputation, and ability; the undesirability of the case; the professional relationship with the client; and awards in similar cases.[157] Although this approach thoroughly identifies the relevant considerations, it has been criticized for failing to provide

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C.F.R. §§ 308.96-.110 (Federal Deposit Insurance Corporation)).

153. 5 U.S.C. § 553 (1976).

154. 488 F.2d 714 (5th Cir. 1974).

155. Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973). A thorough discusson of both the *Johnson* approach and the lodestar method is contained in E. Larson, Federal Court Awards of Attorney's Fees 122-53 (1981).

156. Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir. 1978).

157. 488 F.2d 717-19.

any guidance as to how to apply the various factors and what weight each should be given relative to the others.[158] The Fifth Circuit itself has recently described a method of applying the *Johnson* factors that is very similar to the lodestar method.[159]

The lodestar method, which has been formally adopted by the Second, Third, Eighth, and the District of Columbia Circuits,[160] involves the same basic considerations as the *Johnson* approach. However, it offers a simpler method of applying them. Established and refined in a series of Third Circuit cases,[161] the lodestar method directs courts to start by multiplying the hours spent by each attorney by a reasonable hourly rate for that attorney's services, ordinarily based on the attorney's normal billing rate. When the attorney has no billing rate (for example, a legal services attorney or a salaried civil rights lawyer), the courts set reasonable rates based on the ordinary rates of attorneys of comparable experience in cases of comparable complexity.[162] The figure obtained in this multiplication is the "lodestar." It may be altered by findings on two sets of factors: contingency factors, including the likelihood of success at the beginning of the case and the financial risks undertaken by the attorney; and quality factors, including the quality and efficiency of the attorney's observed performance and the result obtained.[163] On the basis of its findings on these factors, the court

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158. *See* Northcross v. Board of Educ., 611 F.2d 624, 642 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

159. *See* Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 583 (5th Cir. 1980).

160. *See* Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*); International Travel Arrangers v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975); Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); and cases cited in note 161 *infra*.

161. *See* Prandini v. National Tea Co., 585 F.2d 47 (3d Cir. 1978) and original appeal, 557 F.2d 1015 (3d Cir. 1977); Hughes v. Repko, 578 F.2d 483 (3d Cir. 1978); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (*en banc*) and original appeal, 487 F.2d 161 (3d Cir. 1973); Merola v. Atlantic Richfield Co., 515 F.2d 165 (3d Cir. 1975). For a full discussion of the development of the lodestar method, see Larson, *supra* note 155, at 122-27.

162. *See* Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); Imprisoned Citizens Union v. Shapp, 473 F. Supp. 1017, 1025 (E.D. Pa. 1979).

163. Lindy Bros. Builders v. American Radiator and Standard Sanitary Corp., 540 F.2d 102, 116-18 (3d Cir. 1976), and original appeal, 487 F.2d 161, 168 (3d Cir. 1973).

may apply a multiplier to increase or, less often, decrease[164] the total fee award.

How do these approaches relate to the Equal Access to Justice Act's mandate of awards at prevailing market rates? Though the factors traditionally used to determine reasonable fees are not irrelevant to determinations under the Act, the prevailing market rate language suggests that courts and agencies making awards under the Act should apply the factors with a different emphasis. For attorneys who ordinarily charge hourly rates, the customary rate for similar services will generally be the best evidence of the prevailing market rate for the kind and quality of services furnished. Therefore, this factor should be given significant weight, as it is in the initial step of the lodestar method. As with cases under other attorneys' fee statutes, the reasonable rate for the services of an attorney who has no customary hourly rate can be determined by reference to the customary rates charged by attorneys of comparable experience for cases of comparable complexity—the prevailing market rate.[165] (Indeed, the legislative history makes clear that one of the main reasons for including the reference to prevailing market rates is

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164. In Hughes v. Repko, 578 F.2d 483, 488 (3d Cir. 1978), the Third Circuit ruled that the absence of contingency factors does not justify decreasing a fee award. An award may, however, be reduced on the basis of quality factors. *See* Lindy Bros. Builders. v. American Radiator and Standard Sanitary Corp., 540 F.2d 102, 118 (3d Cir. 1976).

165. When the attorney has no regular billing rate, proving the "prevailing market rate" will be challenging. The Act itself requires submission of "an itemized statement from any attorney, agent, or expert witness . . . stating the actual time expended and the rate at which fees and other expenses were computed." 5 U.S.C. § 504(a)(2) (Supp. IV 1980); 28 U.S.C. § 2412(d)(1)(B) (Supp. IV 1980) (excluding the words "or agent"). When there is any question about the appropriateness of the "rates at which fees and other expenses were computed," courts and agencies will undoubtedly require some justification. In the rules governing its own administrative proceedings, the Justice Department requires that attorneys without regular billing rates submit "affidavits from two attorneys or agents with similar experience, who perform similar work, stating the hourly rate which they bill and are paid by the majority of their clients during a comparable time period." 46 Fed. Reg. 48,921, 48,924 (1981) (to be codified in 28 C.F.R. § 24.403(b)(2)). While affidavits of other counsel are probably a good way to establish a reasonable rate, the rule's specificity on the contents of the affidavit seems unnecessarily limiting. Affidavits attesting to the skill and experience of the attorney for whom fees are sought, the reasonableness of the rates sought in view of the rates generally charged in the community or the affiant's charges for comparable cases (*not* for the majority of his or her cases, a figure which will vary enormously depending on the diversity of the attorney's practice or clientele), or similar matters should also be acceptable. *See* Larson, *supra* note 154, at 282-83. In some cases, the rates requested may be so clearly reasonable that such affidavits are not necessary at all.

to insure that such attorneys receive awards at market rates rather than on the basis of free or reduced rate fee arrangements.[166]) The rate obtained for each attorney can then be multiplied by the hours reasonably spent on the case.[167]

Contingency and quality factors, or the additional *Johnson* factors, may appropriately be used to make modest adjustments to the figures obtained when an attorney has undertaken truly exceptional risks or achieved truly exceptional results. Frequent use of large multipliers to adjust basic rates, however, would cut against the Act's explicit directions. As a practical matter, moreover, the impact of such multipliers on awards will be significantly reduced by the $75 ceiling on hourly rates. Where a proceeding requires attorneys with specialized regulatory agency expertise, for example, the attorneys' customary rates may seldom be lower than the ceiling to start with, and application of even modest multipliers will rapidly send the rates of many attorneys over the ceiling.

Similarly, downward multipliers based on extremely poor quality services should be applied sparingly, if at all, to avoid a gross departure from the Act's definition of reasonable fees. To a great extent, an attorney's lack of skill will be taken into account in the prevailing rate applied to his or her services, before con-

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166. H.R. Rep. No. 1418, *supra* note 10, at 14-15; S. Rep. 253, *supra* note 10, at 16-17; 125 Cong. Rec. S10923 (daily ed. July 31, 1979) (statement of Sen. Kennedy).

167. Under existing fee-shifting statutes, courts have considered factors such as whether some of the time spent was duplicative and whether time was spent on issues as to which the party did not prevail in determining the total hours for which fees will be awarded. *See generally* Larson, *supra* note 154, at 177-91. In cases under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), most courts have concluded that all non-duplicative hours spent, and not just those spent on winning issues, may be compensated. *See* Larson, *supra* note 154, at 177. Under the Equal Access to Justice Act, it is probably more appropriate to limit compensation to the time spent on claims as to which the applicant prevailed and the government's position was not substantially justified. Neither the Act nor its legislative history reveals any intent to subsidize the conduct of losing litigation against the government (or of winning litigation in which the government has nevertheless acted reasonably) simply because it is heard together with a matter for which a fee is awarded. In any event, courts and agencies should not make awards for duplicative or unnecessary hours. The ACUS model rules take this into account by including in the factors that agencies should consider in determining the amount of an award "the time reasonably spent in light of the difficulty or complexity of the issues in the proceeding." Model Rules, *supra* note 68, at 32,913, § 0.106(c)(4). *Accord*, Photo Data, Inc. v. Sawyer, No. 81-2435 (D.D.C. Feb. 22, 1982) (striking 40% of prevailing attorneys' time as nonproductive in awarding fees under 28 U.S.C. § 2412(d) (Supp. IV 1980)).

sideration of specific quality factors, since under the Act prevailing rates are to reflect the kind and quality of services furnished.

The basic approach to determining reasonable compensation for expert witnesses will probably be similar, with emphasis on the witness' customary charge for similar services as well as the going rate for such services among other experts in the field. Since judges and agency hearing officers are less likely to be generally familiar with these charges than with prevailing legal fees in the community, a party seeking an award may wish to provide especially strong documentation for the rates claimed for witnesses. Before expending too much effort to establish the prevailing rate, however, the party should determine the applicable ceiling on expert witness rates, which is the highest rate, paid such witnesses by the United States for court proceedings, or by the agency for administrative proceedings. At least in the case of agency proceedings, the applicable rate may be very low. Some agencies have explicit authority to pay experts particular rates; those without such authority are limited by the statutory ceiling on compensation payable to federal civil service employees. Through December 31, 1981, this ceiling was $50,112 per year, or $24.09 per hour;[168] since that date, it has been $58,500 per year, or $28.12 per hour.[169] Needless to say, the actual charges of experts such as accountants, economists, engineers or doctors retained by private parties to assist in particular cases may often exceed these rates.

B. Recovery of Out-of-Pocket Expenses

Can successful applicants for awards recover amounts for the out-of-pocket expenses of their attorneys in addition to fees based on hourly rates? In court cases, of course, some expenses can already be recovered as costs under 28 U.S.C. section 2412(a).[170] However, these costs do not include all of the items,

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168. Pub. L. No. 97-51, 95 Stat. 958 (1981); 5 U.S.C. § 5308 (1976).

169. Pub. L. No. 97-92 (1981).

170. 28 U.S.C. § 2412(a) (Supp. IV 1980) permits the award against the United States of the costs listed in 28 U.S.C. § 1920 (Supp. IV 1980). These include:

> (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special

such as telephone, travel, and some copying charges, for which a client may have to reimburse an attorney. And there is no provision even for costs such as deposition transcripts or standard witness fees in agency proceedings. If the Act is to reimburse applicants fully for the cost of litigation, these items should be recoverable to the extent that they are ordinarily billed separately to clients.[171]

The Act, however, makes no mention of these expenses, and the Justice Department has contended that they should not be included in awards because the Act's list of certain items included in "fees and other expenses" is intended to be exclusive.[172] While the Act does include such a list, it provides that the term "fees and other expenses," "includes" these items; it does not explicitly limit covered fees and expenses to the items on the list.[173]

Discussion in the committee reports suggests that Congress may have intended out-of-pocket expenses to be recoverable: "The ceiling on attorney fees relates only to the compensation of lawyers or agents. . . . It does not include their overhead expenses or other costs connected with their representation of a particular interest in a proceeding."[174] The reference to "overhead expenses" is puzzling, since those expenses traditionally thought of as overhead—office rent, utilities, secretarial salaries—are generally incorporated into attorneys' hourly billing rates, and the prevailing market rate for an attorney's services would be high enough to cover these expenses. Congress cannot have intended to permit attorneys to recover separately under the Act for these expenses. On the other hand, it would be illogi-

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interpretation services under section 1828 of this title.

171. This is the approach taken by the ACUS model rules. Model Rules, *supra* note 68, at 32,913, § 0.106(b). *But see* Photo Data, Inc. v. Sawyer, CA No. 81-2435 (D.D.C. Feb. 22, 1982) (limiting award for expenses to those identified in 28 U.S.C. § 1920 (Supp. IV 1980)).

172. *See* Comments of the Justice Department on Draft Model Rules, *supra* note 72. *See also* Model Rules, *supra* note 68, at 32,904-05.

173. In defining other terms in the Act, Congress used the word "means" rather than the word "includes." Congress may have used "includes" because it intended the definition not to be exclusive. Rather, its purpose in listing particular items may have been primarily to authorize compensation for items not ordinarily included in "fees," such as the cost of studies and tests. *See* Model Rules, *supra* note 68, at 32,905.

174. H.R. Rep. No. 1418, *supra* note 10, at 15; S. Rep. No. 253, *supra* note 10, at 16.

cal for Congress to have made the point that the $75 per hour ceiling applies only to attorneys' compensation unless it intended for some other expenses to be recoverable regardless of the ceiling. A sensible reading of the report that does not overly strain the text would be to assume that "connected with their representation of a particular interest in a proceeding" modifies "overhead expenses" as well as "other costs," and that Congress meant to permit separate recovery of the out-of-pocket expenses ordinarily billable to clients. Recovery of such expenses has been permitted in some cases under other fee-shifting statutes.[175]

C. Time Spent Seeking a Fee Award

The Equal Access to Justice Act presents numerous legal issues, and applications for fee awards may often prompt factual disputes as well. As a result, prosecuting an application for an award of fees may be an expensive proposition. The Act and its legislative history do not clearly state whether legal hours spent on the fee application are compensable under the Act. Under the Civil Rights Attorneys' Fees Awards Act of 1976 and other fee-shifting statutes, however, the courts have generally concluded that fee awards may include amounts for time spent seeking the award.[176] These decisions are based on the belief that forcing attorneys to litigate without compensation to obtain fees would contravene the purpose of the fee-shifting statutes by effectively reducing the hourly fees awarded and discouraging attorneys from undertaking the cases in the first place.[177] One exception to this general trend applies in cases where the fees are to be awarded from a common fund created by the litigation. There, some courts have awarded fees only for work that itself benefited the fund, a category that would seldom, if ever, include litigation over the fee.[178]

The concerns that prompt the denial of awards for time

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175. *See, e.g.*, Northcross v. Board of Educ., 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); Population Servs. Int'l v. Carey, 476 F. Supp. 4, 8 (S.D.N.Y. 1979).

176. *See* cases cited in Larson, *supra* note 154, at 171-73.

177. *See* Lund v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978); Stanford Daily v. Zurcher, 64 F.R.D. 680, 683-84 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978).

178. *See* Seigal v. Merrick, 619 F.2d 160 (2d Cir. 1980); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (en banc).

spent seeking a fee in common fund cases will not ordinarily be raised by cases under the Act. Here the general rule that such time should be compensated to avoid defeating the purpose of the fee-shifting statute should apply. This is especially true since one of Congress' primary reasons for enacting the Act was to reduce the imbalance it perceived between the resources of the government and those of its opponents.[179] If the time spent litigating fee issues is not compensable, agencies can exploit this imbalance of resources to make pursuit of a fee award extremely burdensome.

Requests for fees for time spent on fee issues, however, may be scrutinized very closely. In *Lund v. Affleck*,[180] a case under the Civil Rights Attorneys' Fees Awards Act of 1976, the First Circuit observed that where an "attorney's initial claims are exorbitant, or the time spent advancing them unreasonable, the district court should refuse the further compensation."[181] The message is that attorneys should not feel free to litigate every issue concerning the fee, regardless of its merits or its significance, but should act responsibly in seeking and accepting a reasonable fee for the services rendered. This principle should apply equally to cases under the Equal Access to Justice Act.

D. Retroactivity

By its terms, the Act applies to any otherwise covered case or agency proceeding "which is pending on, or commenced on or after" October 1, 1981. This provision applying the Act to pending cases is consistent with court interpretations of other fee-shifting statutes that did not explicitly answer this question. In *Bradley v. School Board of Richmond*,[182] the Supreme Court retroactively applied the fee-shifting provision of the Education Amendments of 1972[183] to award fees for litigation that had been pending for several years when the relevant statute was enacted, because "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the

179. Pub. L. No. 96-481, tit. II, § 202, 94 Stat. 2325 (1980).
180. 587 F.2d 75 (1st Cir. 1978).
181. *Id.* at 77.
182. 416 U.S. 696 (1974).
183. 20 U.S.C. §1617 (1976).

contrary."[184]

The Justice Department, however, reads this provision of the Act to mean that attorneys' fees incurred after October 1, 1981, may be recovered in cases pending on that date, but not fees for services rendered before that date. A manual on the Act prepared by a Department task force sets out its views that waivers of sovereign immunity can be made only by express legislative command, and that the Act does not by its terms provide for the award of fees incurred before its effective date.[185]

Under other fee-shifting statutes, however, application to cases pending at the time of enactment has meant retroactive application. While it is true that the Act constitutes a waiver of sovereign immunity, it is also true that retroactive application is consistent with the purposes of the Act, perhaps even more than with the purposes of the civil rights fee-shifting laws which have been held to apply retroactively. The latter statutes are designed to promote litigation by encouraging attorneys to take on cases they otherwise might reject—an incentive obviously not relevant to work already performed. The Act is motivated in part by similar concerns, but it is also intended to compensate parties for expenses they have incurred to defend against unreasonable government action. In terms of this purpose, there is no logical distinction between expenses incurred before the Act's effective date and those incurred later. The Act should apply to pending proceedings from the time that the attorneys' work started.

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184. 416 U.S. at 711. Relying on this holding of the *Bradley* case, which did not involve an award of fees against the United States, the District of Columbia Circuit has found that the government may be liable for attorneys' fees under the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976), with respect to work performed prior to the effective date of that fee-shifting provision. Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977).

185. Shaw, Award of Attorney Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act, Office of Legal Policy, United States Department of Justice (1982). The Department has also advanced this position in a pending Fourth Circuit case, Pacific Legal Found. v. Goyan, No. 80-1854 (Government's Response to Pacific Legal Foundation's Motion for Attorneys' Fees Under the Equal Access to Justice Act, dated January 20, 1982) and a pending district court case, Globe, Inc. v. United States, No. 80-1898 (D.D.C.) (Defendant's Opposition to Plaintiff's Application for Attorneys' Fees Under the Equal Access to Justice Act, dated Nov. 27, 1981). At least one district court decision does allow recovery of fees for attorneys' work performed in the case before the effective date of the Act, Photo Data, Inc. v. Sawyer, No. 81-2435 (D.D.C. Feb. 22, 1982); *see also* Costantino v. United States, No. 81-1571 (E.D. Pa. Dec. 1, 1981).

VII. Payment of Awards

One technical, but nonetheless crucial, question may raise difficulties for parties seeking fee awards: where is the money for payment of awards to come from? The Act states:

> Fees and other expenses awarded . . . may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with Sections 2414 and 2517 of [Title 28, United States Code].[186]

Earlier versions of the legislation had provided for payment exclusively by individual agencies;[187] the House Judiciary Committee added the alternative of payment from the general permanent appropriation for the payment of judgments[188] to reflect its belief that the purpose of the Act is to compensate litigants and not to punish agencies.[189]

Section 207 of the Act, however, provides that "[t]he payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts." This provision was added on the floor of the House of Representatives,[190] after the Chair sustained a point of order that the bill without section 207, by extending the purposes for which funds could be withdrawn from the Treasury under a permanent appropriation, constituted an appropriation on a legislative bill in violation of the House Rules.[191] Thus, since no specific appropriation has been requested or made for payment of awards under the Act out of the judgment appropriation, awards cannot presently be paid from

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186. 28 U.S.C. § 2412(d)(4)(A) (Supp. IV 1980). 5 U.S.C. § 504(d)(1) (Supp. IV 1980) is almost identical.

187. *See* S. 265 as passed by the Senate, 125 Cong. Rec. S10912 (daily ed. July 31, 1979); H.R.6429, as reported by the House Comm. on Small Business, Report on the Small Business Equal Access to Justice Act, H.R. Rep. No. 1005, Pt. 1, 96th Cong., 2d Sess. (May 16, 1980).

188. This appropriation is contained in 31 U.S.C. § 724(a) (1976).

189. H.R. Rep. No. 1418, *supra* note 10, at 12.

190. 126 Cong. Rec. H10214-218 (daily ed. Oct. 1, 1980).

191. 126 Cong. Rec. H10214 (daily ed. Oct. 1, 1980).

that source.[192]

As a result, parties entitled to awards must look to the individual agencies for payment. Do the agencies have to pay? Despite the permissive tone of the statutory language and the fact that individual agencies also have received no appropriations specifically for the purpose of paying awards under the Act, the answer appears to be yes. Section 207 applies only to payments from the judgment appropriation; it does not bar payment from agency budgets without specific appropriations. The House Judiciary Committee Report suggests that, even before the addition of section 207, agencies were to be the first source for payment of awards, regardless of the statutory provision that such payments "may" be made by agencies:

> Section 504(d) establishes that awards may be paid out of the budget of the agency whose actions are found substantially justified [sic], thereby making each agency accountable for its actions. Funds may be appropriated to cover the costs of fee awards or may otherwise be made available by the agency (e.g., through reprogramming). If the agency does not pay the fees and expenses, then provision is made for payment from the U.S. Treasury. . . . An accounting will be kept of agencies responsible for such payments.[193]

An informal May 1981 opinion of the Acting Comptroller General of the United States[194] agrees that agency funds are to be the primary source of payments under the Act. The opinion also relies on the legislative history quoted above to conclude that agencies will be liable for the payment of awards even without specific appropriations for such payments, despite the statutory references to payment "from any funds made available to

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192. Read literally, § 207 appears to bar the payment of awards of costs against the United States under 28 U.S.C. § 2412(a) (Supp. IV 1980), even though such costs were payable before enactment of the Act. Based on the legislative history of the adoption of § 207, however, the Acting General Counsel of the U.S. General Accounting Office has concluded that § 207 was not intended to, and does not, bar the payment of costs awarded against the United States out of the judgment appropriation. *See* letter from Harry R. Van Cleve, Acting General Counsel, General Accounting Office to Stephen L. Babcock, Executive Director, ACUS (Oct. 21, 1981) (on file at ACUS).

193. H.R. Rep. No. 1418, *supra* note 10, at 16. The report discusses payment of awards in court proceedings in similar terms. *Id.* at 18-19.

194. Letter from Milton J. Socolar, Acting Comptroller General of the United States, to Reuben B. Robertson (May 15, 1981) (comments of the General Accounting Office on ACUS Draft Model Rules) (on file at ACUS).

the agency . . . for such purpose." The Acting Comptroller General noted that "the purpose of the Act would be frustrated by an interpretation which would permit an agency to avoid payment merely by failing to include an appropriate item in its budget justifications."[195] Thus, unless and until Congress appropriates funds for the payment of awards, either by agencies or from the permanent judgment appropriation, agencies against which awards of fees and expenses are made will have to stretch existing funds to cover the payments. This situation should certainly encourage extreme caution on the part of agency litigators.

IX. Conclusion

As a regulatory reform measure, the Equal Access to Justice Act may be effective in prompting agencies to exercise greater care in initiating and conducting litigation, particularly since agencies will apparently be responsible for payment of any fee awards made against them. Because of its broad sweep, however, it may also discourage the zealous pursuit of legitimate public interest responsibilities assigned to agencies by Congress. In addition, the Act may also work effectively to compensate the victims of abusive or careless government litigation practices, although obtaining this compensation may be quite burdensome if agencies decide to litigate fee issues aggressively.

Nevertheless, the Act is not likely to have the dramatic impact on litigants that it might appear to have at first glance. If the "substantially justified" standard for evaluating the government's position is applied as it has been under the Federal Rules of Civil Procedure and as the legislative history of the Equal Access to Justice Act indicates it is to be applied, awards of fees and expenses will be made only when the government has been unfair or plainly careless in its actions. A few awards, or perhaps even the threat of awards, should be enough to encourage agencies to modify their practices to avoid liability for fees and expenses. Until the courts answer some basic questions and establish standards for applying the Act's provisions, in any event, the Act's most dramatic impact is likely to be in the area of disputes and litigation over its own terms. At least in the short run, the Act may generate more heat than light.

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195. *Id.* at 2.

Senator GRASSLEY. We now will hear from a panel from the private sector. Scheduled to appear was Sara-Ann Determan, chairperson for the Special Committee on Lawyers' Public Service Responsibility, the Consortium on Legal Services and the Public. As she is ill, it is my understanding that Mr. John S. Pachter, chairman of the Federal Contract Claims and Remedies Committee of the Section of Public Contract Law will be giving testimony for Ms. Determan.

Then, we have Ms. Sally Douglas, assistant director of research, National Federation of Independent Business; Mr. Jere Glover, an attorney with the Small Business Legislative Council; and Mr. Jim McQuiston, a private consultant with McQuiston Associates.

For the record, I would like to say that Ms. Determan, who is not here, is immediate past chairperson of the ABA's Special Committee on Lawyers' Public Service Responsibility, and Mr. John Pachter is here with the testimony, and he chairs the ABA's Federal Contract Claims and Remedies Committee. Mr. Pachter recently authored an article published in the "Public Contract Newsletter" on the Equal Access to Justice Act.

Ms. Douglas is assistant director of research for the National Federation of Independent Business. She has been with the NFIB for 6 years and is extensively involved in researching how the Equal Access to Justice Act has affected and will continue to affect small business.

Mr. Glover is a private attorney who will testify on behalf of the Small Business Legislative Council and the Small Business Legal Institute.

Mr. McQuiston, as I said, is a private consultant who has conducted intensive legal analysis of this act and its impact on small business. And I want to thank particularly Mr. McQuiston for having to come here all the way from California.

I would like to have you proceed in the manner in which I have introduced you, and I would also appreciate if any of you would introduce any colleagues or associates you have with you.

So please proceed, Mr. Pachter.

STATEMENT OF JOHN S. PACHTER, CHAIRMAN, FEDERAL CONTRACT CLAIMS AND REMEDIES COMMITTEE, SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY KEVIN DRISCOLL; SALLY L. DOUGLAS, ASSISTANT DIRECTOR OF RESEARCH, NATIONAL FEDERATION OF INDEPENDENT BUSINESS; JERE GLOVER, ATTORNEY-AT-LAW, SMALL BUSINESS LEGISLATIVE COUNCIL; AND JIM McQUISTON, PRIVATE CONSULTANT, McQUISTON ASSOCIATES

Mr. PACHTER. Thank you, Mr. Chairman.

It is a pleasure to be here. I have with me Mr. Kevin Driscoll, from the American Bar Association. Sara-Ann Determan, who was scheduled to appear this morning, regrets that she is unable to do so because of serious illness and hospitalization of her son. She asked that we submit her written statement, and I would ask that if there are any questions regarding that statement that we be permitted to respond in writing. I did not come prepared to present her testimony.

Senator GRASSLEY. Without objection, so ordered, and if we do have any questions, you would prefer to have us ask her instead of you, then?

Mr. PACHTER. Yes, Senator.

Senator GRASSLEY. Please proceed, then, with your testimony.

Mr. PACHTER. I am appearing as chairman of the Committee on Federal Contract Claims and Remedies of the Section of Public Contract Law of the American Bar Association.

Our proposed technical amendment, which is attached to my statement, would clarify that agency boards of contract appeals have authority to award attorneys' fees under the act.

The problem that we face has to do with the relationship between the Equal Access to Justice Act and the Contract Disputes Act of 1978. The latter act created an option available to contractors for the first time, whereunder a contractor had a choice of either taking a claim directly to what was then the U.S. Court of Claims or, as an alternative, proceeding to the Board of Contract Appeals within the agency.

Now the U.S. Claims Court has taken the place of the former Court of Claims, but if attorneys' fees are recoverable in the Claims Court, but not before the Boards of Contract Appeals, then the optional remedies which were intended to be equal will not any longer be equal. There will be an imbalance, as a result of which there will be an incentive on contractors to file their suits directly in the U.S. Claims Court, as opposed to taking their claims administratively before the agencies; and this is a result that Congress did not intend when it passed either the Contract Disputes Act of 1978 or the Equal Access to Justice Act. I might add to that list, the Federal Courts Improvement Act of 1982.

UNCERTAINTY OF JURISDICTION

In addition, the uncertainty surrounding the jurisdiction of the Boards of Contract Appeals, which I will describe very briefly—it is covered in more detail in my statement—has resulted in the additional unfortunate occurrence that the small businesses have wound up litigating jurisdictional battles before the Boards of Contract Appeals and now before the U.S. Claims Court, rather than being able to come before these boards and the court and present their claims for attorneys' fees on the merits.

Three agencies—the Postal Service, the Department of Labor, and NASA—in publishing their regulations, have taken the position that the Equal Access to Justice Act does not apply to those agencies' Boards of Contract Appeals. And we believe—in fact, the Armed Services Board has indicated in one of its opinions—that the authors of those regulations were probably influenced by S. 1223, currently pending before this committee, which would require agencies to pay attorneys' fees from existing appropriations with no opportunity for coming back for additional appropriations. I might add parenthetically that the Contract Disputes Act of 1978 specifically requires agencies to pay both court judgments and Board of Contract Appeals awards out of their own appropriations, but it specifically says out of available appropriations or out of additional appropriations, if nesessary.

Against the background of the regulations that say that the Equal Access to Justice Act does not apply to Boards of Contract Appeals, we have several boards that have issued decisions saying that the act does apply—although to date, no board has awarded any fees. The boards that have held in favor of jurisdiction are in the Defense Department, the Agriculture Department, the Postal Service, and GSA. The Postal Service Board, in reaching this result, said that its own agency's regulations to the contrary were simply without effect and were invalid.

ADDITIONAL CASE CITED

There is an additional case not mentioned in my prepared statement, which is *Fidelity Construction Co.*, a Department of Transportation Contract Appeals Board decision, in which the Board denied an award of fees, but without reaching the question of its jurisdiction under the act to award fees that might have been incurred after the act's effective date, October 1, 1981. In that case, all of the fees that were claimed predated the effective date of the act, and the Board concluded that the act was not intended to be retroactive.

Now, this case has been appealed, and it was argued to the U.S. Court of Appeals for the Federal Circuit this past Monday, December 6, along with two other cases, *August Gava* and *Kay Manufacturing*—which are mentioned at pages 4 and 5 of my statement. We expect a ruling from the court of appeals within the reasonably near future, and that ruling may include the jurisdiction of both the boards and the new U.S. Claims Court, which was set up as an article I court to take over the work of the Trial Division of the former U.S. Court of Claims. If the court of appeals does hold that the Boards of Contract Appeals lack jurisdiction, then the need for our amendment would be strengthened. At present, we are able to state that the act is not fulfilling the intent of Congress to help individuals and small businesses combat the deterrent effect posed by the expense of defending against or challenging unreasonable Government actions.

That is the conclusion of my prepared remarks, Senator.

Senator GRASSLEY. Thank you.

Ms. Douglas.

Ms. DOUGLAS. Mr. Chairman, I am happy to be here on behalf of the over 500,000 small and independent business owner members of NFIB, to testify once again to our support for the Equal Access to Justice Act.

Among the various issues which concern our members, Equal Access has to be considered one of the top priorities. Our members strongly endorse the idea by a margin of 8 to 1 in a mandate poll, conducted in August of 1975, which was the basis of our support for the legislation which was finally enacted. In 1980, the White House Conference placed a high priority on equal access. And in the past few years, 11 States have enacted equal access legislation. Last week, the Pennsylvania Legislature passed such legislation, and the Governor is expected to sign, so I guess the tally is up to 12. And there are several other States that are considering similar legislation.

REASON FOR SUPPORT

Our support for equal access was based on the unprecedented increase in Government regulation and the impact that that was having on small businesses, who became easy targets for unwarranted actions by Federal agencies. It has been well-documented in legislative history, and I do not think I need to go into any great detail, but the problem that our members found themselves in was that for economic reasons, and not having to do with the merits of the case, they were coerced into compliance with unwarranted, capricious, arbitrary actions by the Federal Government, simply because they did not have the resources to contest the action. And we had complaints from members about $100 fines from an agency. The $100 was not what bothered them. It was the idea that they had no recourse, that it would cost thousands of dollars to take the agency to court and try and win the case.

I think our support for equal access was based on the fact that it was intended to remedy this situation by placing the Government and small business on a more equal footing. It helped to mitigate the economic impediments and allowed a decision by a small business to contest an action solely on the basis of the merits of the case.

We see the act as being intended to accomplish two purposes, that is, to restore to the small business owner his right to protect himself against unwarranted Government action and also to provide an incentive to Federal agencies to act more responsibly.

I do not think it has ever been critical to us in terms of the number or dollar amounts of the awards made under equal access, simply that the potential is there and that there is recourse for the small business owner. To that extent, I believe the act is beginning to have an effect. As Mr. Cadwell mentioned earlier, any time you enact legislation for the benefit of small business, regardless of the efforts of Congress, the SBA, and organizations like NFIB, to educate the small business community, it takes a while to grasp the fact that there is recourse available to them I believe. While I do not believe the opponents of the legislation will ever be justified in the overstatement of the financial burden the Federal Government will have as a result of this, I do think we will, hopefully, see an increase in the petitions and small business taking more opportunities to protect themselves under the Equal Access to Justice Act.

EMPHASIS SWITCH APPROVED

One of the most important things equal access to justice did for our members was to switch the burden of proof that always used to rest with them over to the Government. And we see this as a very common sense basis to the legislation, that being that the party who has easiest access to and the most knowledge of the facts in question should bear the burden of proving that they were substantially justified in their actions. It is far easier for the Government, obviously, with all the facts at hand, to explain why a particular action was taken, than it is for the small business to try and garner all the facts and present the case that they were not justified.

I address this particular comment to the provision in TEFRA, which passed in August, that switches the burden back on the taxpayer in IRS cases. This is of particular concern to us not only because it effectively guts the Equal Access to Justice Act, but also because IRS is the single agency of the Federal Government that impacts the universe of small businesses; there is a greater potential threat of unwarranted actions. Past statistics would indicate that IRS is not always justified. And we would urge the subcommittee to seriously consider repealing that section of the act, and making it clear that IRS is indeed within the purview of the Equal Access to Justice Act.

The only other comment I would make on legislative change at this point is Senate bill 1223, and the provision which is of greatest concern to us there is the floor, if you will, the financial floor. If you have suffered a loss in excess of $500, then you can file under the Equal Access to Justice Act.

As I said before, most of our members are not always slapped with heavy fines. Five hundred dollars for a small businessman can be a particularly heavy burden. The idea is to preserve their right to protect themselves regardless of the particular financial loss, and we would not support a provision that would set a floor before having access to the act.

Senator GRASSLEY. Thank you.

Before I go on to the other two witnesses, Mr. Pachter, your last statement that you made, I did not get the full impact of it. I think it was a summary statement on either support or opposition to the legislation—your very last statement that you made.

Mr. PACHTER. Senator, the very last statement was that the act is not fulfilling the intent of Congress insofar as it was intended to assist small businesses in the Government contract sphere, and individuals, in combating the deterrent effect of unreasonable Government actions.

Senator GRASSLEY. So from your standpoint, then, you are implying that it needs to be improved and strengthened?

Mr. PACHTER. That is correct, Senator.

Senator GRASSLEY. Thank you.

Mr. Glover, please proceed.

Mr. GLOVER. Thank you, Senator. It is an honor and a privilege to be here.

I am an attorney in private practice, representing primarily small businesses. Prior to entering practice, I was a Deputy Chief Counsel for Advocacy of SBA and worked extensively on the passage of the Equal Access to Justice Act. Today, I am here on behalf of the Small Business Legislative Council, which is an organization of 69 trade and professional associations, representing primarily small businesses.

Since my statement is in the record, let me just direct my attention specifically to some of the points and proposals that have been brought up. I think we should look first at the issue of requiring $500 loss or pecuniary damages.

Traditionally, in the enforcement role—and I have served as head of enforcement divisions at two different Government agencies, the Consumer Product Safety Commission, and I was an antitrust attorney for the Federal Trade Commission. Whenever you

impose a dollar amount, what happens is that immediately that becomes the ceiling. Every award suddenly becomes $499.99. So when you go out and fine somebody, you simply say, "I can get around equal access by simply dropping the fine one penny."

If you set it at $250, the same thing happens. The reason for the law is very clear. Where there is an injustice, there is recourse.

Now, the other area we get into is the recovery should not be disproportionate to the amount in controversy. Well, to the extent that the fees are there at all, and where the Government is acting without substantial justification, the Government controls the amount of fees. Once they realize that that action is going to be lost, and they are not going to prevail, they should terminate that action. The Government should not let that case continue and those fees mount up. They can always go in, very quickly and very easily, and say to any judge or to any administrative officer, "This case is dismissed, period." At that point, fees obviously stop. They control their own destiny. If they are doing their job as enforcement officials for their agency, there should never be an award that is disproportionate to the amount in controversy, because the Government can stop the case. They control what cases they bring, and they control how long those cases last.

It seems like every time small business wins another battle, we immediately have to go through 2 years of trying to convince everybody that the law really was passed, it really is a law, and that we should not go around making major modifications. There is a basic engineering principle that I have always been told, and that is, if it is working, don't fix it. I think what we see here is a law that is working. I was shocked when OMB started floating drafts around and said that the administration wanted to gut or seriously weaken equal access to justice. I am glad they thought better of that original proposal and have now dropped that out. I am still concerned about it—the fee cap provision of $75 an hour.

As a Government attorney and working closely with the Congress and having been on the staff of the Small Business Committee in Congress, $75 an hour seemed like a good bit of money when we were considering the law. Unfortunately, now that I am in private practice, I realize that when 45 percent of your revenue in any law firm in Washington certainly goes to overhead, including your office space and your secretary and keeping the phones working and so forth, that $75 an hour is not adequate. It did envision that there would be some contribution by the attorney, and that perhaps the law was not fullv designed to fully compensate the attorney for his normal fees in all cases. Proposals that it be reduced to the same hourly wages that we are paying Government employees, I think, are somewhat ridiculous.

Unfortunately, I have supervised about 20 attorneys in two different positions in the Government. I wish I got 8 hours of hard work out of each of them every day, and unfortunately, I was never able to do that. If you divide the amount of productive time into the hourly wage, it will come out substantially in excess of $75. But many attorneys in Government and elsewhere are not always productive, and when you take it to their average hourly salaries, I think that is not really equitable. I think the going rate throughout the United States, the private attorneys I am aware of, involved in

Government litigation, $75 would be substantially below their normal fee. I think proposals have been offered to reduce that down to $25. And if that is what you are saying to the private individual or the small businessman, it is, in effect, "You can no longer afford adequate counsel." Any attorney in private practice that you can hire at $25 an hour, in all likelihood is not going to represent the small businessman very well. So the small businessman is going to have to end up subsidizing his attorney's fees to get him to even represent him.

I am surprised by the Department of Justice's continued position concerning fees incurred prior to October 1, 1981, when the law became effective. There was a fairly long leadtime from the time the bill was passed until it became effective. The drafters' reasoning was that time would allow the Government to dismiss any cases that had substantial fees, and they were going to lose before the law became effective.

I am surprised—even more than surprised—they found one judge to agree with them.

I think the Internal Revenue Service should clearly be brought back into the proceeding. I agree with our friends from the ABA, that procurement section was not properly drafted. It was rather inarticulately done, and it should have been clearly involved and clearly included. Perhaps that is an area that Congress should get into when it is considering reauthorization of this bill. We have to be very cautious. Our opponents, when reauthorization is considered, say that things are much worse this year than last year. This year we see the results, with the exception of two cases. One involves the Fitzgerald whistleblower case, which is rather notorious and rather famous. The Government agreed to a $200,000 fee in that case. There is another case in Los Angeles which was referred to by the Department of Justice, which certainly does not seem to be an equal access case in that the award was $300 per hour. The judge has a very novel reading of the law. It seems to me to be very clear limitation at $75 an hour. I think that that case will be overturned. But with those two exceptions, the average recovery is around $4,000. In administrative proceedings to date, no money has been paid out.

I can see next year, when we are in the middle of our debate on the floor, our opponents coming up and saying: "Since last year, there has been a 100-fold increase in the amount of agency awards paid out." Well, that is easy. It could be 10,000 times, because agencies did not pay anything last year. If they pay out anything this year, it is a dramatic increase. So, let us be cautious about comparisons one might make, because we should expect there to be an increase this year. But again, compared to the $500 or $600 million a year projected to be paid out in the Department of Justice's estimates, I think we are going to be well under that no matter what happens. I would caution that when the debate comes, there will be a substantial increase next year, because this year was so low, obviously the next year is going to be substantially higher.

I think the law has worked exactly as Congress had intended it to do. There has not been the abuse by either the small business or the Government agencies that anybody had feared. It is a good balance, and it is working very well.

Senator GRASSLEY. Thank you.

Mr. McQuiston.

Mr. MCQUISTON. Thank you, Mr. Chairman.

Rather than reading my prepared statement, I would rather submit it for the record, if that is permitted.

Senator GRASSLEY. Your statement will be made a part of the record, as I said, in every instance.

Mr. MCQUISTON. I think judicial access in one particular, narrow field is to some extent economics, but I do not think that is the only question, because every time you involve yourself with your own country, there comes to mind a statement that someone said, "Breathes there a man with soul so dead, who ne'er to himself has said, 'This is my own, my native land.' "

On the other hand, I do not think it is appropriate for our Government to take advantage of that by saying attorneys or whoever should donate their services to the United States just because it is their country.

So, as a consultant, I have a high disregard for people who insist on getting, you might say, opinions from their doctors at cocktail parties and what not. I think the same thing could easily happen here.

DECIDING TO LITIGATE

We have the Congressional Budget Office estimating approximately $18,000 per case on a typical fee award. In my own experience, that is probably quite accurate. We are not talking about a $1,000 award here or a $5,000 award or something like that. We are talking big money, to a small businessman,

Then, he wants to know, "What are the percentages? If I pay out this $18,000, am I just contributing to my Government? Maybe I do not even make $18,000 gross in a year." That is a very large amount for a small businessman, especially small businessmen I deal with personally. Ninety percent of the business, or over, in this country dealing with the Government, is dealt with with people having less than six employees. Those people do not have to have a very high gross in order to make a comfortable living, if not a substantial living.

The probability of success right now, on the other hand, is something like one in five, and the probability of compensation, even using the CBO figures, is something like one in twenty-five. Now, that is very, very slim odds indeed when going into battle with your Government. Even if you are substantially justified and you have an ironclad case, you have to consider things like standing and other minor, other matters, which are not so minor, but of which the average person does not even have any comprehension whatsoever.

You have to make a decision, on that basis, before you even decide to contest, with this highly technical decision and whether or not to lay out $18,000 of your money on the belief that you are going to help your country.

That is a substantial question that every small businessman must answer before he proceeds. Where can he get this information? He can go to his attorney, if he has one, but most small busi-

nesses do not really see attorneys, because they do not have problems that involve attorneys in their day-to-day businesses. So he calls up someone and says, "I have a question in administrative law. Can you advise me?"

And the fellow says, "I did not even have that in school, let alone in practice. You will have to find someone who is specialized. And most of those people are in Washington, D.C." This actually was my experience. So that means that you are more or less stuck, if you are, for example, in California, trying to find someone very, very quickly, because most of these decisions have to be made—this is well understood by this Senate—in a very short time span, and the jurisdiction of those times cannot be waived.

So you have to interview someone you have never seen before. You have to believe in him. You have to believe that he knows what he is talking about. You have to make a decision to put out this money without any idea whatsoever that the fellow has ever had any success. These are also substantial questions.

THE SOVEREIGNTY PROBLEM

On the other hand, there are these 18 million contracts per year, which are let by the United States of America, both in the defense category and in the general services category, which are mainly let to small businesses. And these contracts are let with a mixture of sovereignty and of ordinary commerce.

Now, the Supreme Court has said that when the United States enters into a contract, it does not enter into it as a sovereign. It puts aside that sovereignty, and it engages a contractor just like any ordinary person. So a small business, then, expects the same standard in commerce, with the United States as would be applied to any other customer; and yet the United States considers itself different. It has procurement regulations which it insists on, and so forth. And not only that, but it has also the Defense Production Act, which says that the President is authorized to compel performance; you have no choice but to deal with the United States of America if it so chooses, and it will decide whether or not it chooses to; you have no recourse on that.

All these points, I believe, are fully justifiable, except for the problem of what happens when the United States decides to enter into some kind of an agreement this way. Where does the 5th amendment end, and where does normal commerce begin? This is a sore point right now with the United States, and with people like myself, who have thought about this for quite a long time and are frankly quite concerned about this issue.

HORIZONTAL CONTROL OF PROCUREMENTS

But on the other hand, the United States itself is concerned about the management problem of the tremendous procurement budget—something over $180 billion. That is a large amount to keep track of. The Congress cannot keep track of it. No agency can keep track of it. We depend on the lowest possible level to keep track of everything. How in the world can we organize, from a management standpoint, to keep these people vertically under control? There may be six or seven layers of management involved.

We cannot organize to do that without horizontal access, namely from these small businessmen objecting to practices which they see printed in these regulations and which are not being fulfilled.

Now, this horizontal input, I am discussing right now with the Senate Governmental Affairs Committee. But on the other hand, I believe that the Judiciary Committees are vitally concerned with this, because we should not be fragmenting these basic problems into all of these committees: basic problems like deciding where the 5th amendment does lie in these particular things. I think this is something to which the Judiciary Committee must address itself to and has addressed itself.

ARTICLE I COURTS AND U.S. CONTROVERSIES

Committees have decided that they are going to forget about the 5th amendment. We have article I courts, for example, that we have heard talked about in this hearing room today.

I think if we go back to what Madison said in "The Federalist," for example: he said that, "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointive or elective, may justly be pronounced the very definition of tyranny." I think this is something that we are forgetting in our discussions here, and I think it is as appropos today as any other time. The Supreme Court has said so, many, many times, and I have addressed these points in my statement, so I am not going to repeat them in the small amount of time here.

But I must say that also, "The standard for good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government." Hamilton said that, in "The Federalist" in 1788, and it is as true today as it was then.

We have just seen, supposedly, the Federal Courts Improvement Act of this year, and also the creation of, supposedly, more article I courts, this seems to be the new wrinkle in jurisprudence. I do not agree with this at all. I think it is an example of oppression.

For people like myself, who are faced with these $18,000 litigation expenses, I submit that if I went to an agency and had to get a decision from the agency, which has already made its decision, then whether we put that decision in the hands of a legislative court or whether we put that in the hands of some other administrative law judge, we actually are tempting the administrative law judge to be pressured by the executive department. I do not think this is proper, and I think it is up to the Judiciary Committees of both Houses to be ever watchful for when this happens. It can happen in any kind of a bill. Section 292 of H.R. 4961 is a good example of what's happening. There was no debate on that. It was enacted under a gag rule. Now, no one could have stopped this. I do not hold the Congress to blame for this. But it is something which we have to have some way of controlling.

The suspension of rules in our country has to be addressed. I do not know how the Congress can operate without suspending its own rules occasionally. But I do not see how the Congress can insist that no one else may suspend its own rules, if the Congress

suspends its rules. Somehow, these points have to be addressed, because if we do not address them, and we do not have a Westminster type of Parliament here, we are inviting a dictatorship. So much for the soapbox.

EQUAL ACCESS TO JUSTICE ACT

As far as the act is concerned, I have dealt very extensively with the act, and my training as an analyst has enabled me to analyze every single word in the act, for the meaning behind the word. Several of the words were changed through the legislative course. Several of these were, intentionally you might say, obfuscated, in my own personal belief, because of the powerful opposition to this act. But we cannot let the powerful opposition to this act deter the Congress from what is right. And what is constitutional is for the courts to decide.

As we have seen, the courts are busy deciding the law, and they can draw on a rich fabric for guidance. This act did not spring just overnight from someone's head. It was debated a very long time. In the meantime, we had all the rules and the regulations and the decisions from EEOC, and from the courts on the title VII decisions, and whatnot; and the Department of Justice itself argued in favor of making awards in those cases. But now, the Department of Justice has decided to overturn its own arguments, which it had used with respect to private litigants, simply on the basis of sovereignty, et cetera. These are problems which I think this Congress must address and which are very serious questions.

I thank Senator Domenici. I would put him on a pedestal, from my own experience. He certainly was valiant in his effort in getting this act passed, and I will defend it to the death, if I can.

But I think effectiveness is something more than just the Congress acting in a vacuum. I think it is something more than people like myself testifying. I think the country will respond if the country knows about it. But I think the act has been kept a dark secret from many people, including attorneys.

I think when the act catches on, that will be the time to conduct the proper oversight of the act's effectiveness.

Senator GRASSLEY. Is that the end of your testimony?

Mr. MCQUISTON. I would say one other thing. I do not want to leave an impression that I think that the Government is doing anyone an injustice. I do object to the mechanism of discovering and remedying the injustice, and nothing else.

Senator GRASSLEY. Thank you, Mr. McQuiston.

LIMIT ON HOURLY RATES

I have a few questions. Mr. Glover already responded to the $75 limit on hourly fees, whether or not that should be increased. I would like to have the ABA's and NFIB's views on that.

Mr. PACHTER. Senator, the ABA does not have a position on that, and therefore, I could only speak from my personal point of view.

Senator GRASSLEY. Yes; let me say, either your personal views or those of your organization.

Mr. PACHTER. I think that some flexibility is called for, although I agree with Mr. Glover that the Congress may have certain objec-

tives in mind in terms of compensating, but not necessarily fully compensating.

I agree with him, that an effort to reduce the $75 limit down to something that is equated to salary divided into an hourly basis that is paid to Government attorneys is a mistake. This is not a basis for comparability. If you were to take that salary and add onto it the overhead represented by the cost of support services, rent, utilities, and all those things, alone, it would go way up. The mistake, on the part of some people, is to believe that whatever the hourly rate charged by lawyers is 100 percent profit.

So I agree with Mr. Glover on that point. But the act, as I recall, states that an increase could be made if regulations of the agency provide that circumstances warrant it. To the surprise of no one in this room, the agencies so far as I know have not come up with any regulations that would permit an increase. But that indicates the intent of Congress that under circumstances, if warranted, an increased amount could be awarded. And the refusal of the agencies to state what circumstances, in their opinion, might warrant it, should not impose a barrier on the courts. The courts could pick up on this and write their own regulations, so to speak, in individual cases.

Senator GRASSLEY. Ms. Douglas.

Ms. DOUGLAS. NFIB does not have a position on this particular point. In my own personal opinion there is, as has been stated, a certain amount of flexibility written in the law which has not been used properly or has been ignored by agencies. As for the $75 an hour figure, obviously, any time you put a financial cap, you are dealing with whatever the economic situation, the cost of living, et cetera, happens to be at the time. Perhaps we should allow for some adjustment.

But I would also agree with what Jere said earlier, that I do not think it was the intent, or it may not have been the intent, to fully compensate, but rather, to mitigate the expense.

Senator GRASSLEY. Mr. McQuiston, did you have a point of view on this?

Mr. MCQUISTON. Yes; I would hold with the ABA position. I think this has already been addressed, in the ABA's Code of Professional Responsibility, DR2-106. It says, "A fee is clearly excessive when, after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."

Therefore, I do not think that a cap is necessary in the legislation, when we already can go back to the code of professional responsibility of the ABA.

SOURCE OF APPROPRIATE FUNDS

Senator GRASSLEY. If any of you addressed this, we can skip over the ones who have spoken to it, but I particularly want to know your view on where the funding for the awards should come from—special appropriations or from the agencies' operating budgets.

Mr. PACHTER. Senator, as I indicated earlier, section 13(c) of the Contract Disputes Act of 1978 says that the payment will be made, for both court judgments and Board of Contract Appeals awards,

out of available funds—"or by obtaining additional appropriations for such purposes." That was the intent of Congress in the 1978 Contract Disputes Act, and I think it would be a mistake, personally speaking—this is not an official ABA position—to have a different result built into the Equal Access to Justice Act. Already, the mere threat of barring the agencies from coming back for additional appropriations, has caused some problems, even though it is not law, it is merely a pending bill.

Senator GRASSLEY. Mr. Glover.

Mr. GLOVER. When I was working in the Office of Advocacy, we were trying to brief all of the agency officials in General Counsel's Office about the Equal Access to Justice Act before it was being implemented. I made the comment somewhat jokingly, that in my opinion, it should come out of the head of the agency's personal budget and his salary. That did not seem funny to the agency employees then; it seems more so now. But realistically, the agencies' budgets certainly have not been overtaxed to date, and I think it is reasonable to continue taking it from the agencies' budgets.

In those situations where an agency has an excessive award, then they should come to Congress, and they should be able to explain to Congress: We lost $400,000 of the taxpayers' money. We need a supplemental budget. But by the way, here is why we did it, and here is what we are doing to keep it from happening again. As soon as they make that showing, Congress should be very liberal in putting that money back in their budget.

But there is a check and balance there where, if there is an excessive amount of awards, the agency is doing something wrong. There is no reason under equal access for there ever to be a $600,000 award to an individual or to a small business, if the Government officials involved are doing their jobs. Whenever the case is that long, they should institute a periodic review, and any case that is in trial for more than 5 days or 10 days, whatever seems reasonable, the agency ask, "Are we wrong; are we substantially justified in bringing this action or continuing this action?" And if they are not, they should cut their losses and dismiss the case right then. When the Government loses a lot of money, they do so knowingly, or because they did not act properly. I do not have a lot of sympathy for them; I think that once they can explain what happened and why, Congress should approve additional funding for them. But clearly, the agency's budget is where it should be. The only reason there is any question is because of some parliamentary maneuvering that had to occur in the House that occurred at the last minute.

Senator GRASSLEY. Ms. Douglas.

Ms. DOUGLAS. I totally concur with Mr. Glover's eloquent statement.

Senator GRASSLEY. Thank you. I am about ready to wrap this up. I know you all wonder how long this is going to go.

Mr. McQuiston.

Mr. MCQUISTON. I would only say that I would support Senator Domenici's original idea, making this a no-fault-type award, in which case, these attorneys' fees would be a minor problem. I do not think each and every one should be brought to Congress attention, but I do believe that they should be made automatic.

suspends its rules. Somehow, these points have to be addressed, because if we do not address them, and we do not have a Westminister type of Parliament here, we are inviting a dictatorship. So much for the soapbox.

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As we have seen, the courts are busy deciding the law, and they can draw on a rich fabric for guidence. This act did not spring just overnight from someone's head. It was debated a very long time. In the meantime, we had all the rules and the regulations and the decisions from EEOC, and from the courts on the title VII decisions, and whatnot; and the Department of Justice itself argued in favor of making awards in those cases. But now, the Department of Justice has decided to overturn its own arguments, which it had used with respect to private litigants, simply on the basis of sovereignty, et cetera. These are problems which I think this Congress must address and which are very serious questions.

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PREPARED STATEMENT OF SARA-ANN DETERMAN AND JOHN S. PACHTER

SUMMARY OF THE TESTIMONY OF THE AMERICAN BAR ASSOCIATION

1. The American Bar Association supports permitting courts and administrative agencies to award reasonable attorneys' fees and other expenses of litigation, under the Equal Access to Justice Act, to a private party who substantially prevails against the government in a case where the public interest would so require.

2. The American Bar Association also supports certain amendments to the Act to remedy a number of ambiguities, gaps and inconsistencies in the Act.

3. The American Bar Association also supports amending the Act so that Boards of Contract Appeals have the authority to award attorneys' fees and costs under the Act.

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to present this testimony on behalf of the American Bar Association. We are here at the request of Morris Harrell, President of the American Bar Association to comment on the Equal Access to Justice Act.

My name is Sara-Ann Determan. I am Immediate-Past Chairperson of the ABA's Special Committee on Lawyers' Public Service Responsibility. The ABA supports permitting courts and administrative agencies to award reasonable attorneys' fees and other expenses of litigation, under the Equal Access to Justice Act, to a private party who substantially prevails against the government in a case where the public interest would so require.

The ABA also supports certain amendments to the Equal Access to Justice Act that I will discuss, to remedy a number of ambiguities, gaps and inconsistencies in the Act.

With me today is John S. Pachter, Chairman of the Committee on Federal Contract Claims and Remedies of the Section of Public Contract Law. Later, with your permission, Mr. Pachter will discuss our proposed technical amendment to the Act regarding coverage of the agency boards of contract appeals.

We are aware of different proposals that have been discussed

to limit the ability of persons or groups to recover attorneys' fees under the Equal Access to Justice Act in proceedings where the action results in a substantial public benefit or enforces an important public right.

In the interest of justice, we urge the Subcommittee to resist the attempts to limit attorneys' fees in these types of cases.

In February of 1978 the Association's House of Delegates adopted the following resolution:

> "RESOLVED, that the American Bar Association supports the principle that reasonable attorneys' fees be included as costs recoverable by prevailing parties in more categories of civil litigation than present rules permit, when that would facilitate the use of legal remedies and services.
>
> "FURTHER RESOLVED, to that end, the ABA urges the Congress of the United States promptly to enact legislation to permit courts and administrative agencies, in the interest of justice, to award as costs reasonable attorneys' fees and other expenses of litigation from public funds to a private party who substantially prevails against the federal government as a named party in a civil action or administrative proceeding, where (a) the action results in a substantial public benefit or enforces an important public right and (b) the economic interest of the party is small in comparison to the cost of effective participation, or the party does not have sufficient resources to adequately compensate counsel.
>
> "FURTHER RESOLVED, that the Sections, Divisions and Committees of the Association are hereby requested to examine whether transfer of fees would facilitate access to legal services affecting their respective areas of concern and to submit their findings to the Consortium on Legal Services and the Public which shall make such further recommendations as these findings may warrant.
>
> "FURTHER RESOLVED, that nothing in this recommendation is to be deemed inconsistent with the recommendation adopted by the House of Delegates in February, 1977, upon recommendation of the Special Committee on Public Interest Practice."

In August, 1982 the Association's House of Delegates adopted another resolution on the subject providing in pertinent part as follows:

> RESOLVED, that the American Bar Association opposes propoals to amend the Equal Access to Justice Act, such as those in S.1223 (97th Cong., 1st Sess.), that would further restrict eligibility or make it more difficult for small businesses, individuals, nonprofit organizations and other eligible parties to obtain reimbursement of expenses arising from unjustified or unreasonable agency action, by imposing requirements (a) that a particular monetary amount have been at issue in order for an award

to be made, (b) that an award be "proportionate" to the amount in controversy, or (c) that an award be based exclusively on a particular attorney's "routine and customary rates."

BE IT FURTHER RESOLVED, that the American Bar Association opposes proposals, such as those contained in the proposed fiscal year 1983 budget, to impose arbitrary and unreasonable limits on the hourly fees for private attorneys that may be recovered from the federal government under various fee-shifting statutes.

Based on these resolutions, the ABA would oppose amending the Equal Access to Justice Act to require that: 1) the prevailing party suffer a pecuniary loss in excess of $500 in his individual capacity and not as a member or representative of an organization or group, and 2) the fee awarded not be disproportionate to the amount in controversy.

Where the economic interest of a party is small in comparison to the cost of effective participation, in order for a party to bring an action that results in a substantial public benefit or enforces an important public right, it is crucial that fee awards be made to parties who prevail against the government. This is the very type of case where fees are urgently needed, in the view of the ABA.

Based on these two resolutions, the ABA would also oppose amending the Equal Access to Justice Act to require a poor person to certify that he or she will pay his or her attorneys' fees should he or she not prevail against the government, in a case brought in the public interest.

Where a party does not have sufficient resources to adequately compensate counsel, in order to bring an action that is meant to result in public benefit or enforce an important public right, it is crucial that the person be able to bring an action on a contingency-fee basis.

The ABA would also oppose amending the Equal Access to Justice Act to place an unreasonable and arbitrary cap on attorneys' fees in public interest cases. Our 1978 resolution calls for the provision of reasonable attorneys' fees.

The ABA accordingly opposes these kinds of amendments to the Equal Access to Justice Act.

As I indicated earlier, the ABA supports certain proposals

to amend the Equal Access to Justice Act. In August 1982 the Association's House of Delegates adopted a resolution on the subject providing in pertinent part as follows:

> RESOLVED, that the American Bar Association supports proposals to amend the Equal Access to Justice Act (Public Law 96-481, October 21, 1980): (a) to provide that fee awards must be paid by the agency against which an eligible party has prevailed; (b) to confrom the eligibility standards for fee awards in court proceedings to those applicable to formal agency adjudications; (c) to clarify the Act to ensure that it covers appellate proceedings seeking judicial review of agency action, not only those proceedings instituted in District Courts; (d) to clarify that fee awards may be made under the Act against agencies participating in proceedings before other agencies; (e) to cover proceedings in the United States Tax Court to the same extent as tax cases in U.S. District Courts and the Court of Claims; and (f) to raise the present unreasonable ceiling on expert witness fees to the maximum rate that may be awarded to attorneys under the Act.

The ABA supports amending the Act as our resolution suggests, for the reasons discussed below.

1. The ABA supports amending the Act to provide that fee awards must be paid by an agency against which an eligible party has prevailed. The Act's payment provisions do not resolve the questions of whether awards can in fact be paid and, if so, where the money will come from. Two provisions, 5 U.S.C. 504(d)(1) and 28 U.S.C. 2412 (d)(4)(A), provide that fees awarded "may" be paid by agencies from funds made available "for such purpose" and, if not so paid, shall be paid from the general judgment fund established under 31 U.S.C. 714a. Section 207 of the Act, however, provides in effect that awards under the Act may not be paid from the general judgment fund unless Congress has made a specific appropriation for that purpose.

The ABA thus supports amending the Act to clarify that the agency whose conduct has caused an award to be be made must pay it. This would not only ensure recovery by the party entitled to an award but would also place responsibility for making that payment squarely upon the agency, thereby serving as a deterrent to similar unjustified or unreasonable conduct in the future.

2. The ABA supports amending the Act to conform the eligibility standards for fee awards in court proceedings to those applicable to formal agency adjudications. As written, the Act provides that parties will be eligible for awards in judicial

proceedings if they meet either the net worth or the number-of-employees limitation of the Act, while parties to formal agency adjudications must meet both the net worth limitation and the number-of-employees limitation to be eligible. This distinction was apparently inadvertent, since there is no indication that Congress intended the eligibility standards to be different. It appears from the legislative history that Congress intended to adopt the eligibility standard of 5 U.S.C. 504(b) (1) (B) for both types of proceedings; if so, the requirements of eligiblity in 28 U.S.C. 2412 (d)(2)(B) should be conformed to those in 5 U.S.C. 504 (b)(1)(B).

3. The ABA supports amending the Act to ensure that it covers appellate proceedings seeking judicial review of agency action. 24 U.S.C. 2412 (d)(1)(A) provides for the award of attorneys' fees in "any civil action (other than cases sounding in tort) brought by or against the United States . . ." It is clear from subparagraph (d)(3) of this section that Congress at least contemplated that proceedings for judicial review of "adversary adjudications" as defined in Section 504(b)(1)(C) of the Act are covered by the term "civil action"; Congress probably intended that cases in the United States Courts of Appeals seeking judicial review of other agency actions, such as orders issued in informal adjudications and promulgation of final rules, would also be included within this category. The term "civil action" may be interpreted less inclusively, however, as in Oppenheim v. Campbell, 571 F.2d 660 (D.C. Cir. 1978), where the court held that only actions commenced by filing a complaint in court are "civil actions" for purposes of a statute of limitations provision in Title 28; the question of what appellate review proceedings are covered by the Act could result in needless litigation if Congress does not make its intention more clear.

There is, in any event, no indication of any intent by Congress to restrict the types of cases before the Courts of Appeals in which a fee award may be made, and there are ample reasons to allow eligible prevailing parties to recover their

litigation costs in such cases where the government has acted unreasonably or without substantial justification. Accordingly, the ABA proposes that 28 U.S.C. 2412(d)(1)(A) should be amended to apply explicitly to "any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States . . . ."

4. The ABA supports amending the Act to clarify that fee awards may be made under the Act against agencies participating in proceedings before other agencies. The Act on its face may be interpreted to cover only situations in which a single agency both litigates and decides a case at the administrative level. Some statutory schemes, however, provide for one agency to litigate cases before another agency. For example, OSHA enforcement proceedings are conducted by the Department of Labor before the Occupational Safety and Health Review Commission. In addition, agencies sometimes participate voluntarily in other agencies' proceedings; examples include Department of Justice, Department of Transportation and Federal Trade Commission intervention in regulatory agency proceedings. A review of the legislative history indicates no intention by Congress to exclude these proceedings from the coverage of the Act if they otherwise fall within the statutory definition of "adversary adjudication."

In order to clarify that these situations are covered, the ABA proposes that a new provision be added to 5 U.S.C. 504(a), as follows:

> If an agency participates as a party in an adversary adjudication conducted by another agency, a party who prevails against the participating agency may seek an award of fees and expenses, and the adjudicative officer may make an award against such participating agency as provided in this section.

5. The ABA supports amending the Act to raise the present ceiling on expert witness fees to the maximum rate that may be awarded to attorneys under the Act. The Act provides that awards for the services of expert witnesses may not exceed the highest rate payable by the government to such experts, which is currently $28.12 per hour. This ceiling is unreasonably low for many expert witnesses. The ABA urges Congress to raise

the cap to the $75 per hour ceiling for attorneys' fees by amending 5 U.S.C. 504(b)(1)(A) and 28 U.S.C. 2412(d)(2)(A)...

With your permission, Mr. Pachter will now discuss the ABA's proposed technical amendment regarding coverage of the agency boards of contract appeals.

Mr. Pachter

Mr. Chairman and members of the subcommittee, I am John Pachter and I appreciate this opportunity to comment on proposed amendments to the Equal Access to Justice Act. I am Chairman of the Committee on Federal Contract Claims and Remedies of the Section of Public Contract Law.

The Act represents a significant step in accomplishing the Congressional goal of "placing the Federal government and civil litigants on a completely equal footing." H.R. Rep. No. 96-1434, 9th Cong., 2d Sess. ("Conference Report") at 25. Our proposed technical amendment would further that objective by clarifying that agency boards of contract appeals have authority to award attorneys fees to eligible parties under the Act. Last November the Board of Governors of the American Bar association adopted a resolution to this effect, which is attached to my statement, along with a background report.

The Act, as currently worded, does not expressly apply to proceedings before agency boards of contract appeals. The Act does apply to "adversary adjudications," defined as adjudications under the Administrative Procedure Act. 5 U.S.C.A. § 504(b)(1)(C) (West Supp. 1981). Those adjudications have traditionally been viewed as excluding hearings before boards of contract appeals. Our technical amendment would simply amend the Act's definition of "adversary adjudication" in 5 U.S.C. § 504(b)(1)(C) to include adjudications under the Contract Disputes Act of 1978:

> (C) "adversary adjudication" means an adjudication under Section 554 of this title <u>or under the Contract Disputes Act of 1978</u> in which the position of the United States is represented by Counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the

purpose of granting or renewing a license;

. . . .

On the other hand, the Equal Access to Justice Act did apply to optional direct contract suits in the former Court of Claims, 41 U.S.C. § 609(a)(1) (Supp. III 1979), and we believe that the Act applies to those suits in the United States Claims Court, which assumed, on October 1, 1982, the trial function of the Court of Claims under the Federal Courts Improvement Act of 1982. */ See, 28 U.S.C. § 2412 (d)(1)(A). In addition, the Equal Access to Justice Act clearly applies to suits for review of agency board of contract appeals decisions by the United States Court of Appeals for the Federal Circuit; in fact the statute provides for recovery of fees incurred during both the agency and the court phases of the litigation. 23 U.S.C.A. § 2412(d)(3) (West Supp. 1981).

Need to Preserve Balance of Remedies in Contract Disputes Act

These circumstances create a potential imbalance in the Equal Access to Justice Act, which threatens to disturb the alternative remedies established in the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (Supp. III 1979). The Contract Disputes Act created two equal and alternative remedies for Government contractors. A contractor may either (1) appeal an unfavorable final decision of a Government contracting officer to the agency board of contract appeals (41 U.S.C. § 607(a)), or (2) file suit directly in the Claims Court (41 U.S.C § 609(a)(1) as amended by § 161(10), P.L. 97-164).

However, if eligible contractors can recover attorneys fees in the Claims Court but not the Boards of Contract Appeals, small contractors will have an incentive--which Congress never intended--to file a Disputes Act suit directly in the Claims Court and avoid the boards. This result is inconsistent with the legislative purpose of both the Contract

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*/ The Federal Courts Improvement Act of 1982, among other things, abolished the Court of Claims and created two courts, the Court of Appeals for the Federal Circuit and the United States Claims Court. The Claims Court was made an Article I court (the old Court of Claims was an Article III court).

Disputes Act and the Equal Access to Justice Act. It further frustrates the Equal Access to Justice Act by forcing a small contractor to litigate jurisdictional issues rather than the merits of its claim for attorneys fees.

We submit that there should not be a distinction between the Claims Court and the boards on the issue of award of attorneys fees and that the resolution of this issue should not be left to the uncertainty of litigation.

Agency Interpretation Against Coverage

Several agencies, in their regulations, have refused to implement the Equal Access to Justice Act in board proceedings. Two agencies, the Postal Service and the Department of Labor, have issued regulations expressly stating that the Act does not authorize their boards to award attorneys' fees. See 46 Fed. Reg. 45943-948 (September 16, 1981), 46 Fed. Reg. 63020-024 (December 29, 1981).

NASA has published interim regulations that are silent on the authority of its board to award attorneys' fees. See 47 Fed. Reg. 3758-762 (January 27, 1982). But a NASA spokesman appears to have taken the position on behalf of the agency that the Equal Access to Justice Act does not apply to NASA board proceedings. Fed. Cont. Rep. (BNA), No. 917 at A-7 (February 1, 1982).

This agency reaction was probably influenced by S. 1223 which is currently pending before the Senate Judiciary Committee. This bill would require agencies to pay fee awards from existing appropriations, rather than from additional appropriations made for that purpose.

Developments Since March 18, 1982

On March 18, 1982 I testified before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee. Since then, several decisions on this subject have been rendered by the Court of Claims and the Boards of Contract Appeals. The Court of Claims and its

successor, the United States Claims Court, have noted their jurisdiction under the Equal Access to Justice Act to award attorneys fees. See August Gava, Jr. v. United States, Ct. Cl. Trial Division No. 317-78 (July 29, 1982); Kay Manufacturing Co. v. United States, Ct. Cl. Trial Division No. 478-73 (July 30, 1982); Grace Baptist Church v. United States, U.S. Claims Court No. 737-817 (Oct. 13, 1982).

Also the Armed Services Board of Contract Appeals has held that it has derivative jurisdiction to award attorneys fees under a section of the Contract Disputes Act of 1978 that provides that the Boards of Contract Appeals are "...authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." 41 U.S.C. § 607(d). Brand S. Roofing ASBCA No. 24688, 82-1 BCA ¶ 15,717 on recon. 82-1 BCA ¶ 15,935 (1982); K-Mor Construction Co., Inc., ASBCA 23397-d, 82-1 BCA ¶ 15,954 (1982). Two other agency Boards of Contract Appeals, in the Agriculture Department and Postal Service, have rendered similar decisions. See Claude C. Wood Co., AGBCA 79-176-1, 82-2 BCA ¶ 15,999 (1982) and Stephens Associates, PSBCA No. 933,82-2 BCA ¶ 16,043, (1982). The Postal Board held that it had authority to award attorneys fees even though, as stated above, that agency's regulations state that the Board lacks such jurisdiction. In addition, the General Services Administration Board has indicated in dictum that it has the authority to award attorney's fees. See Jack Faucett Assoc., Inc., GSBCA No. 5443-R, 81-1 BCA ¶ 14,936.

However, no board has actually awarded attorneys fees under the Equal Access to Justice Act. Moreover, as discussed above, the issue remains clouded because several agencies' regulations state that the Equal Access Act does not apply to board of contract appeals proceedings. The new United States Court of Appeals for the Federal Circuit, which assumed the appellate function of the former Court of Claims as of October 1, 1982, under the Federal Courts Improvement Act of 1982, P.L. 97-164, has not ruled on the matter. Since there is

conflict between agency regulations and board decisions, it is probable that the Justice Department will appeal the first board award of attorneys fees to the new Circuit Court. This will would impose upon some unfortunate small contractor the burden of litigating the issue. Thus, Congress should clarify the Equal Access to Justice Act to confirm that the Boards of Contract Appeals do have jurisdiction.

One final development should be noted. A question has been raised in litigation before the Armed Services Board of Contract Appeals whether the Federal Courts Improvement Act, by making the new Claims Court an Article I court, deprived that Court of the power to award attorneys fees under the Equal Access to Justice Act. The issue relates to two Tax Court decisions which held that since the Tax Court is not a "court of the United States" as defined in 28 U.S.C. § 451, it is not empowered to award attorneys fees under the Equal Access to Justice Act. See Davidson v. CIR, TC Memo 1982-319 (June 8, 1982) and McQuiston v. CIR, 78 TC No. 56 (May 13, 1982). We believe that these Tax Court decisions are incorrect, since the Equal Access to Justice Act broadly confers the power to award attorneys fees on "any court having jurisdiction." 28 U.S.C. ¶ 2412(d)(1)(A). Nevertheless, this new matter further confirms the need for clarifying language in the Equal Access to Justice Act to explicitly grant the Boards of Contracts Appeal authority to award attorneys fees under the Equal Access to Justice Act.

Conclusion

In conclusion, our proposed technical amendment would clarify that proceedings before Boards of Contract Appeals are covered by the attorneys fees and cost recovery provisions of the Equal Access to Justice Act. The amendment is needed to preserve the balance of the disputes-resolution system established by the Contract Disputes Act of 1978. It is also made necessary by refusal of some agencies to implement the Act by regulations making it applicable to their Boards of

Contract Appeals. This uncertainty has created unnecessary litigation which burdens the very businesses that the Act was designed to benefit.

Finally, the amendment is consistent with the legislative intent of the Act to help individuals and small businesses combat the deterrent effect posed by the expense of defending against or challenging unreasonable government actions.

REPORT

The recommended technical amendment to the Equal Access to Justice Act, by adding the words "or under the Contract Disputes Act of 1978," would clarify that boards of contract appeals have authority to award attorneys' fees and costs under the Act. Some agency boards have indicated that the Act does apply in cases before them. The Chairman of the Armed Services Board of Contract Appeals, in his annual report for fiscal year 1980, suggested that Section 8(d) of the Contract Disputes Act, which authorizes boards of contract appeals to grant any relief available to a litigant in the Court of Claims, would make applicable 28 U.S.C. § 2412 as amended, which provides for an award of attorneys' fees in contract actions in the Court of Claims. Similarly, in Jack Faucett Associates, Inc., GSBCA No. 5443-R, 81-1 BCA ¶ 14,936, the General Services Board noted in dicta that after October 1, 1961, it would have authority pursuant to the Equal Access to Justice Act, to award attorneys' fees and costs to eligible appellants.

Nevertheless, the Equal Access to Justice Act does not grant specific authority to agency boards to award attorneys' fees, and government agencies may contend that the Act, as a waiver of sovereign immunity, should be strictly construed. The danger that the Act will be construed as not applying to proceedings before agency boards of contract appeals poses a substantial problem for government contractors and their

attorneys. The nature of the problem, and the reasons for the proposed solution, are discussed below.

ACUS Model Rules; Uncertainty Introduced. The Administrative Conference of the United States has issued model rules for guidance of federal agencies implementing the Equal Access to Justice Act. 46 Fed. Reg. 32900-915 (June 25, 1981). In its statement accompanying the model rules, the Conference referred to a distinction in Section 204 of the Act (28 U.S.C. § 2412(d)(3)) between "adversary adjudications as defined in 5 U.S.C. 504" and "adversary adjudications subject to the Contract Disputes Act of 1978," and concluded that there is "some indication" that board proceedings are not covered by the Act. However, the Conference did not attempt to resolve the issue. Instead, it stated that

> individual agencies are far better equipped to determine whether their proceedings are under Section 554 of the Administrative Procedure Act than we are, since this determination requires knowledge of the particular laws administered by each agency.

46 Fed. Reg. at 32,902.

The Administrative Conference's statement has introduced uncertainty concerning applicability of the Act. This could discourage agencies from issuing appropriate regulations.

S.1223; No Additional Agency Appropriations. Moreover, a bill for technical amendment of the Act, S. 1223 (introduced May 19, 1981), would provide that fees and other expenses awarded under the Act "shall be paid by the particular agency over which the party prevails, from any sums appropriated to that agency," and that "no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses awarded under this section." Any agency that is inclined to interpret the Act as not applying to its board of contract appeals would thus have an additional incentive to implement the Act consistently with that interpretation, to avoid having to pay fees and costs out of existing appropriations. This is

particularly so in light of ever increasing budgetary constraints.

Possible "Tilt" Toward Court of Claims. If (by regulation or decision of a board of contract appeals), an agency should conclude that the Act does not apply to board proceedings, this could create a "tilt" toward the Court of Claims in Contract Disputes Act cases.

Contractors might see an advantage to filing suit in the Court of Claims, where they could possibly recover attorneys' fees and costs, instead of filing an appeal to a board, where they could not. But Congress did not intend, by enacting the direct access provisions of the Disputes Act, to favor the Court over the boards of contract appeals. Congress likewise did not intend, by enacting the Equal Access to Justice Act, to create an incentive to file suits in the Court of Claims rather than appeals before the agency boards. The mere uncertainty alone could create a "tilt" toward the Court of Claims.

Potential Malpractice Exposure. Moreover, the current uncertainty on this issue could impose unique disclosure requirements on private attorneys in counselling clients whether to initiate actions in the Court of Claims or a board. An attorney who counsels his client to file an appeal before an agency board, without also informing the client that attorneys' fees are recoverable in appropriate cases in the Court of Claims, but that the issue may be unresolved at the board level, may be risking malpractice liability.

Retroactivity. Finally, to avoid any imbalance in favor of the Court of Claims prior to enactment of this amendment, the amendment should be made retroactive to the effective date of the Equal Access to Justice Act, October 1, 1981.

Agency Implementation Of The Existing Act

Although a technical amendment is necessary to remove any doubt as to the applicability of the Act to board proceedings,

the agencies need not await congressional authorization to so implement the Act. OFPP and the agency heads should be encouraged to implement the existing Act by issuing regulations clearly providing that the Act applies to board proceedings. A suggested letter from the Section Chairman to OFPP and the appropriate agencies is therefore part of our recommendation.

EQUAL ACCESS TO JUSTICE ACT

BE IT RESOLVED, That the American Bar Association supports the amendment of the Equal Access to Justice Act so that Boards of Contract Appeals have the authority to award attorney fees and costs under the Act.

Adopted by the Board of Governors, November 1981

Prepared Statement of Sally L. Douglas

Mr. Chairman, NFIB, on behalf of its more than 505,000 small and independent business members, appreciates the opportunity to testify to our strong and enthusiastic support for the Equal Access to Justice Act, Title II of Public Law 96-481. We commend the Chairman for holding this hearing on the effectiveness of the Equal Access to Justice Act and on the modifications to the Act which are currently before the Congress.

Among the various national policy issues which concern small business, interest and support for equal access legislation has been long-standing. NFIB members strongly endorsed the idea by a margin of eight to one in a Mandate poll conducted in August 1975. In 1980, the White House Conference placed a high priority on equal access. Eleven state legislatures have enacted equal access legislation and other state legislatures continue to consider such legislation.

NFIB was in the forefront as a supporter of equal access legislation. Prior to the enactment of the Equal Access to Justice Act, an unprecedented expansion had occurred in Government regulation of small business, producing a significant increase in the number of administrative and judicial proceedings brought against small businesses by government agencies. In 1977, NFIB asked its members, "During the past 24 months has any agency of the Federal Government fined your business?" Members' responses indicated that one in twenty-five small firms receive a fine in a given year. Of those firms, over 50% had accumulated fines of under $2500.

Small firms were faced with a difficult challenge if they chose to pursue any legal remedies. Extended and expensive litigation by a small businessman against a federal agency in an adjudicatory proceeding or in a civil action against a federal agency or the United States was not economically feasible, even when the small businessman firmly believed that he was in the right. Much of the

difficulty small firms faced in contesting a Government action stemmed from the predominance of the "American Rule." This rule, which can be traced back to the development of English legal principles prior to the eighteenth century, requires that each party shall bear his/her own attorneys' fees. Originally conceived to be a means of insuring that all parties would assert or protect their rights without the fear of being penalized for their actions, the "American Rule" is based on the assumption that the costs of securing or vindicating one's rights has equal economic impact on each party to a dispute. This assumption proved to be patently false for those small firms which faced the Government in a judicial action. There is no equality for small business when the opposing party is the Government. Due to economic reasons, the small businessman was to be denied his due process rights under the Fifth Amendment to the Constitution of the United States until October 1, 1981, the effective date for the Equal Access to Justice Act.

Not only would the small businessman be faced with lengthy and costly proceedings, he would also lose valuable time from his livelihood. Many small businessmen would be faced with the prospect of winning a legal fight against the Federal Government only to learn that they would then be bankrupt. It must be remembered that owners of small businesses are not wealthy people as a group. For example, the Census Bureau reported the median income of self-employed males is $1,800 less than male wage and salary earners.[1] Small entrepreneurs do not have the resources to throw away fighting the Federal Government. The Equal Access to Justice Act allows small businesses to defend themselves economically against overbearing and zealous federal agencies by giving them the opportunity to recoup their attorneys' fees and other litigation expenses in court or agency litigation with the Federal Government.

The Equal Access to Justice Act provides that from October 1, 1981 to October 1, 1984, in agency adjudications in which the United

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[1] U.S. Bureau of Census, Current Population Reports, Series P-60, No. 101, "Money Income in 1974 of Families and Persons in the United States," U.S. Government Printing Office, Washington, DC, 1976, p. 139.

States is a party, in actions for judicial review of such adjudications, and in non-tort civil actions brought by or against the United States, federal courts and federal agencies shall award attorneys' fees and expert witness fees to prevailing parties against the United States, unless the United States proves that its position as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The Act covers awards for any study, analysis, engineering, report, test, or project which may be necessary in building a case.

To implement the provisions of the law providing for the award of attorney fees and other expenses to parties meeting certain eligibility standards who prevail over the United States in non-tort civil cases and adversary adjudications before federal agencies, the Act assigns two responsibilities to the Chairman of the Administrative Conference of the United States: (1) to act as a consultant to agencies in the establishment of uniform procedures for the consideration of applications for fees and expenses in their own administrative proceedings; and (2) to prepare annual reports to Congress on the amount, scope, and impact of awards and fees made by agencies in administrative proceedings under the Act.

The Chairman's second responsibility is of great interest to NFIB. We are eagerly awaiting a comprehensive annual report on the total number of cases filed under section 504 of Title 5 of the U.S. Code (adversary proceedings) and Section 2412 of Title 28 of the U.S. Code (judicial proceedings) during the Act's first year. A member of the Staff of the Administrative Conference has informed NFIB that some of the figures in the first report will be "rough, since the federal agencies are sometimes unsure about whether the cases are covered." We hope that the annual report will contain specific information on the parties to the proceedings, a case-by-case breakdown on the denial or granting of an application for a fee award, the legal merits of each case, the resolution of each case and the status of a case at the time of the first report.

The Office of Legal Policy of the Department of Justice recently

prepared a digest of court opinions for the research use of Justice attorneys who must respond to fee applications under the Equal Access to Justice Act. Only those opinions which were forwarded to the Department of Justice Task Force on the Equal Access to Justice Act were included in the compilation of case summaries. We commend the Office of Legal Policy for such a valuable reference source and hope that the annual report will utilize a similar format.

The nine-month report by the Director of the Administrative Office of the United States Courts for the period October 1, 1981 through June 30, 1982 reveals the amount of fees and other expenses awarded by Federal courts under Section 2412(d) of Title 28. Of the 30 petitions for attorneys' fees and other expenses disposed of under Equal Access to Justice Act in the Federal courts, 80% (24) were filed in district courts. The Internal Revenue Service was the agency involved most frequently in equal access decisions, with eight petitions. Six petitions were filed against the Department of Health and Human Services, six against the Department of Interior, and two against the Department of Labor. Eight other agencies were each involved in one equal access decision.

Of the forty-eight cases listed in the digest, there were fifteen cases in which fees were awarded. The IRS and the Social Security Administration were involved on a frequent basis in equal access decisions. In one of the fifteen fee-award cases, a small printing and typesetting firm was erroneously found to be "non-responsible" by the Government Printing Office in its low bid on a contract and was awarded nearly $6,000 by the U.S. District Court for costs in challenging the G.P.O. non-responsibility determination. (Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. Feb. 22, 1982). NFIB is pleased that this small businessman was the one of the first parties to be awarded fees and costs under the Equal Access to Justice Act.

Since the Act took effect on October 1, 1981, we have noted, with great interest and some degree of concern, that there have been some excessive fee awards for legal activities on behalf of a public

interest group. In Greater Los Angeles Council on Deafness v. KCET, No. 78-4715R (C.D. Cal. Feb. 11, 1982), the court awarded a "reasonable" hourly fee of $175.00 (totaling $432,285), with four-fifths of the fees awarded for legal services generated prior to October 1, 1981. The Equal Access to Justice Act sets an attorney's hourly fee at $75.00; however, the law states that a higher or lower rate may be paid if the court determines it. The court noted that this case involved "complex issues of constitutional law and statutory interpretation" which required "the skill of an exceedingly capable attorney" who undertook the case on a contingency basis.

One month after the Greater Los Angeles decision, a public interest law firm, on behalf of certain residents in federally subsidized housing projects, requested fees under both the common fund/benefit doctrine and the Equal Access to Justice Act, Section 2412 of Title 28 of the U.S Code. In this case, Underwood v. Pierce, No. 79-1318-HP (C.D. Cal. Mar. 25, 1982) the court held that there was no reachable common fund for fees since the settlement agreement with the Department of Housing and Urban Development (HUD) explicitly provided that no fees would come from the fund. However, the Court granted the public interest law firm's motion for entitlement for attorneys' fees under Section 2412(d), rejecting the pre-October 1 retroactivity argument and stating that the Government had not met its burden of proving that its position was substantially justified, since the facts in the case indicated that the litigation was required to make HUD comply with congressional directives.

Since the Internal Revenue Service was the agency involved most frequently in equal access decisions by the Federal courts, NFIB is alarmed by a provision which was tucked into the comprehensive Tax Equity & Fiscal Responsibility Act of 1982 (TEFRA). Section 292(c)(2) of the TEFRA contains an exemption for the IRS from the Equal Access to Justice Act (Section 2412 of Title 28 of U.S.C.). This subsection will take effect on February 23, 1983. On that date, the burden of proving that the Government's position was

unreasonable is explictly placed on the taxpayer. Such action will be contrary to the intent of the Equal Access to Justice Act, which placed the burden of proof on the federal agency to show that its case was justified. NFIB strongly objects to the IRS exemption and will work for its repeal. Two other provisions within Section 292 are of concern to small businessmen: first, Subsection b provides that the maximum award in a civil proceeding is limited to $25,000 and second, Subsection b provides that damages of up to $5,000 (up from $500) may be awarded to the United States by the Tax Court in its decision if the proceedings before the Tax Court "have been instituted or maintained by the taxpayer primarily for delay" or if the taxpayer's position in a case is "frivolous or groundless."

Mr. Chairman, while we have stressed the need to bring the IRS clearly under the Equal Access to Justice Act, you have requested that we examine some of the equal access bills which are currently before Congress.

S. 1223 limits the awards of attorneys' fees and other expenses in certain federal agency actions and in certain judicial proceedings involving the United States to prevailing parties who: 1) would have suffered a pecuniary loss in excess of $500 (and in the case of agency actions, such loss was in an individual capacity and not as a member or representative of an organization or group); or 2) were engaged in carrying on a trade or business for profit and (a) the amount in controversy (in agency actions, in excess of $500) was directly related to the conduct of such trade or business, or (b) the adjudication involves a violation of the Regulatory Flexibility Act.

The Senate bill requires that an affidavit of an attorney, which attests to "routine" and "customary" rates, accompany an itemized fee statement. The amount of the attorney's award may "not be disproportionate to the amount in controversy."

The definition of a "party," as defined under S. 1223, would

exclude certain agricultural cooperative associations, tax-exempt organizations, and owners who are not sole owners.

Lastly, the bill requires that the attorneys' fees and other expenses awarded are to be paid by the particular agency over which the party prevails. For judicial proceedings, the fees and expenses awarded are to be paid by the agency issuing an order. S. 1223 permits such payments from any sums appropriated to such agency, but prohibits specific appropriations for such purpose.

NFIB supports the provisions of S. 1223, with the exception of the provisions relating to the recovery of attorneys' fees to prevailing parties who would have suffered a pecuniary loss in excess of $500.

The Equal Access to Justice Act makes no distinction between prevailing plaintiffs and prevailing defendants, although Congress apparently contemplated that its benefits would accrue primarily to those forced to litigate in order to "defend" themselves against unreasonable governmental action. H.R. 296 has attempted to place a distinction in the equal access law by providing that only a prevailing defendant may recover "reasonable" legal fees and expenses in civil actions in which the United States is a plaintiff. NFIB prefers the current law.

Under the equal access legislation as enacted, the law contains a standard for the award of fees which allows the Government to avoid fee shifting only if the Government proves it was substantially justified in bringing an action and is therefore not liable for attorneys' fees. One House bill, H.R. 3796, allows prevailing parties in specified administrative and judicial proceedings to be awarded attorneys' fees and other expenses. H.R. 3796 permits the relevant agency or court to assess a civil penalty against an officer or an employee of the United States if such agency or court determines that the proceeding was based on a "clearly arbitrary or capricious action" of such officer or employee. NFIB currently has this legislation under review.

NFIB hopes that this subcommittee will promote the inclusion of the IRS under the Equal Access to Justice Act. Three provisions within Section 292 of the Tax Equity and Fiscal Responsibility Act of 1982 are of concern to over 500,000 small businessmen and warrant repeal. First and foremost, the IRS exemption to equal access legislation will become effective on February 23, 1983. Such action, as you probably know, will be contrary to the intent of the Equal Access to Justice Act and will jeopardize the outcome of those cases already pending against the IRS. Second, effective February 23, 1983, the amount of reasonable litigation costs, which may be awarded by a prevailing party in a civil proceeding against the United States, shall not exceed $25,000. Third, in a proceeding before the Tax Court, damages of up to $5,000 (up from $500) may be awarded to the United States by the Tax Court in its decision, if the proceedings have been brought by a taxpayer "primarily for delay" or if "the taxpayer's position in such proceedings is frivolous or groundless."

In your consideration of an appropriate legislative remedy to this appalling situation, NFIB hopes that the legislative proposal contains in clear, concise language the IRS's inclusion under the Equal Access to Justice Act. There must not be any question that the IRS is covered by the equal access legislation.

While our members have had a continuing interest concerning the provisions of the equal access law, we have attempted to remind them repeatedly of the contents of the law and its relevance to their business. We have found it necessary to remind them of the need to file an application for an award for fees within 30 days of a final order or decision. NFIB expects the annual report of the Administrative Conference of the United States to show that the Act has encouraged federal agencies to act responsibly, whether an action is instituted against a large corporate entity with an extensive legal staff or a small business which is forced to retain its own legal counsel. The legal case will either be better prepared or the case will simply not be initiated in a court or federal agency. This equal access law has indeed made a significant

impact even if the Act does not result in a large number of awards for small business. The ultimate result will be less wasteful enforcement of regulations and a better work product from government agencies. The performance of government regulators will be monitored closely, both by Congressional committee hearings, as is evidenced today, and by the requirement that the annual report of the Administrative Conference of the United States be submitted to Congress. That annual comprehensive report, containing a case-by-case analysis of the legal merits addressed by particular parties, would assist in this monitoring process.

Prepared Statement of Jere W. Glover

It is an honor and a privilege to appear before you today to discuss the Equal Access to Justice Act.

I am an attorney in private practice representing primarily small businesses. Prior to entering practice, I was Deputy Chief Counsel for Advocacy in the Office of Advocacy, Small Business Administration, and worked extensively on the Equal Access to Justice Act.

Today I am here on behalf of myself and on behalf of the Small Business Legislative Council (SBLC) and the Small Business Legal Institute. The SBLC is an organization of 69 trade and professional associations representing over 4 1/2 million small businesses nationwide. SBLC worked hard for the passage of the Equal Access to Justice Act.

Rarely does Congress pass legislation that has as significant an impact on the way the government functions. The Equal Access to Justice Act is important landmark legislation.

Equal Access is a two edged sword as far as small business is concerned. One edge cuts the bureaucracy down to size and prevents injustice. The other edge cuts against the small business owner who wishes to complain that the government is harassing him with an unjustified legal action, but who in fact is guilty of the violation charged by the government. The public perception has been that the government has routinely harassed small business with unjustified litigation. However, it would seem that government actions against small firms which fall into the category of "substantially unjustified" are fewer than anyone anticipated.

Exactly how many cases and the amount of attorneys' fees involved in such cases has been a matter of much controversy. According to the Department of Justice estimates, the cost to the government would be over $100 million or more per year under Equal Access.* Many of the proponents of Equal Access seriously questioned that figure when the Department of Justice and OMB used it in an attempt to have the legislation defeated. It would appear that the Department's statements concerning the impact of this legislation

*I estimated the cost would be less than $5 million. Even that estimate appears to have been on the high side. The Administrative Conference's estimate was $7.9 million.

were grossly exaggerated to say the least. I assume it was an honest mistake rather than a willful intent to mislead this Committee and the Congress.

Equal Access has been in effect for over one year, and looking at its record during this period we can conclude that this law is working the way Congress and its proponents had envisioned. To date, there have been about sixty judicial cases. Of the cases I am familiar with, the fees awarded under Equal Access have totaled approximately $683,518. In a case in California a Judge awarded fees of nearly $300 per hour for a total of over $400,000. An award of $300 per hour seems excessive and inconsistent with the law. This case is being appealed. The other case with a sizable award ($200,000) is the Fitzgerald case. Clearly he deserves to be compensated for all he was put through. The government agreed to a settlement of $200,000. Attached is a summary of judicial cases through June 30, 1982.

There may occasionally be a case where the government knows it is wrong and that it will lose, but chooses to continue the action. This may be where the government accepts the fact that a very large attorney's fee will likely be awarded. The government has, in these cases, made a budgetary decision and should not be heard to later complain about the amount of the fee award. Likewise in cases where a substantial amount of the recovery was for fees incurred before October 1, 1981, the government had the power to terminate the case before October 1, 1981. When the government chose to continue the case past October 1, 1981, they in effect agreed to assume the risk of a potentially large award and should have no grievances. I believe the Fitzgerald case was one such case.

In administrative cases to date, there have been no awards of attorney fees. According to data collected by the Administrative Conference of the United States, there have been 100 petitions seeking awards. The total fees requested in administrative cases are less than $500,000. How much of these requested fees will be ultimately awarded is unknown. Of the 33 cases that have been decided, 31 petitions for fees have been denied. Only two totaling $21,000 have been recommended for payment. To date no payment has been made. Most of the petitions for fees had already been denied. Given the small number of cases and the limited amount of money involved,

it must be concluded that the outlandish budget-busting predictions of the opponents of Equal Access are unfounded.

The proponents of Equal Access hoped that there would be few awards under the Act. This law is designed to change the government's attitude and eliminate unjustified litigation. By embarrassing the government's attorney handling the case, it was hoped that such cases would never be filed. If our first year's experience is typical, Equal Access is having the desired results.

There is an old engineering principle that seems appropriate at this stage of the application of the Equal Access Act: "If it's working, don't fix it." Those opponents of Equal Access have a very heavy burden of proof to show that changes are necessary. Unless there is overwhelming evidence of a need for amendments, I urge you to consider long and hard any proposed change of this law. We are no longer dealing with a theoretical or academic discussion. The law exists. Not only that, but it appears to be working well. Unless there are numerous instances of abuse and unfairness, this Committee should not rush to modify the law.

The Equal Access to Justice Act has a three year life. It is now one-third of the way through its life. Though significant changes are not substantially justified at this time, certain technical amendments may be appropriate.

Since the Constitution requires administrative proceedings in many instances, I believe the courts will have little difficulty including such proceedings under Equal Access. However, the law as presently drafted is unclear and only the most diligent attorneys will realize that such proceedings are covered by the Act.

We've heard a good bit about the reasonableness of limiting the fee to $75.00 per hour. I have read with interest the proposal by OMB to reduce private attorneys' fees to that of the government attorneys. I would object to any such comparison. Private attorneys have overhead and are paid only for hours they actually work. Government attorneys are paid whether they work or not. I really don't feel the comparison is appropriate.

Another issue that is perhaps timely is whether the fee awards should come out of the general treasury or out of a particular agency's budget. When I was at the Office of Advocacy briefing government attorneys on the

Equal Access Act, I used to say, jokingly, fee awards should come out of the agency head's salary. Seriously, I think awards should come out of the agency budget rather than the general treasury.

Agencies should institute safeguards to limit or prevent awards such as (1) a careful review of all cases before they are filed, (2) periodic review of cases in progress, (3) training programs to insure that their employees understand the law and (4) disciplinary actions against employees who bring or continue such actions. Since each agency itself controls its own destiny, I have little sympathy for the argument that Equal Access awards should not be paid from the agency's budget, but from the general treasury. They know, or should know, the quality of cases they file and defend. If a particular agency finds itself in an embarrassing position of not having funds to cover awards for attorneys' fees in cases where the agency's actions were unjustified, it can always ask Congress for a supplemental appropriation. I would urge Congress to be generous in providing such additional funds once the agency has produced a compliance program showing how it will prevent the problem from recurring in the future. In this regard, agencies should not be permitted to delay payment until specific funds are appropriated. Clearly this would thwart the law. The Committee should be conscious of this problem and insist that agencies pay fee awards promptly. Equal Access is working and is in the public interest.

Thank you for allowing me to appear before you today. I will be happy to answer any questions.

# # #

Table XX
Decisions on Applications for Equal Access to Justice Act Awards
By Type of Court and Agency - October 1, 1981 through June 30, 1982

Court/Agency	Petitions	Petitions Denied		Petitions Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
Total	30	17	$217,133	13[2]	$764,446	$683,518	$676,692	-	-	$6,826
U.S. Court of Claims										
Dept. of the Treasury	1	1	10,391	-	-	-	-	-	-	-
U.S. Courts of Appeals										
Dept. of Labor	2	1	51,479	1	12,930	12,930	12,930	-	-	-
Internal Revenue Service	1	1	22,917	-	-	-	-	-	-	-
Occupational Safety and Health Review Comm.	1	1	4,610	-	-	-	-	-	-	-
U.S. District Courts										
Army Corps of Engineers	1	1	20,829	-	-	-	-	-	-	-
Dept. of Agriculture	1	1	[3]	-	-	-	-	-	-	-
Dept. of Defense	1	-	-	1	200,000	200,000	200,000	-	-	-
Dept. of Health and Human Services	6	2	12,745	4[4]	514,285	443,119	438,446	-	-	4,673
Dept. of Housing and Urban Development	1	1	20,550	-	-	-	-	-	-	-
Dept. of the Interior	6	6	46,860	-	-	-	-	-	-	-
Dept. of Justice	1	1	25,053	-	-	-	-	-	-	-
Gov't. Printing Office	1	-	-	1	10,832	5,901	5,710	-	-	191
Internal Revenue Service	6	1	1,899	5[2]	25,968	21,137	19,235	-	-	1,902
U.S. Bankruptcy Courts										
Internal Revenue Service	1	-	-	1	431	431	371	-	-	60

[1] A = Attorney Fees
B = Study, Analysis, Engineering Report, Test or Project
C = Expert Witness Fees
D = Other, including filing and service fees, telephone expenses, and transportation costs.

[2] Includes two cases where the request for attorney fees was denied and only the request for filing and service fees was granted.

[3] Petitioner did not specify an amount in his request for attorney fees.

[4] Includes one case where $435,999 in attorney fees and other expenses was awarded against the Department of Health and Human Services, the Federal Communications Commission, the Department of Education, and the Department of Justice.

PREPARED STATEMENT OF J. H. MCQUISTON

I am pleased to have this opportunity to testify regarding my experience as a small businessman who has litigated as a "private attorney general" on behalf of the United States. I am grateful to Senator Domenici, for having the desire to develop the Equal Access to Justice Act (EAJA); to Senator DeConcini, for the wisdom and ability to get it enacted despite the formidable opposition of the Administration and the House Ways & Means Committee; to the 92 other Senators whose overwhelming support, despite Administration and W&M pressure, was what enacted this law; and to the Senate and House Judiciary Committees, whose marvelous legislative histories are what have enabled me to counter the Administration's claims of what EAJA is supposed to do.

With regard to the legislative history, I believe that Ms Gail Fogarty produced an outstanding volume in Serial No. 62, 96th Congress House Judiciary Committee (1981). Litigation-compensation judgments for people like myself would certainly be forthcoming if every judge and adjudicative officer were thoroughly familiar with it.

EXPERIENCE

When I began my litigation, as a "client" I frankly knew nothing about "access to justice", nor about "standing", nor even about how costly litigation really is, nor how minuscule was the chance of one's prevailing over a United States agency regardless of the merits of one's case. But my training as a technical and management consultant helped me to become knowledgable quickly. By more-or-less total immersion, and by actively participating for the last three years, I believe I now can represent the viewpoint of a very knowledgable small business litigant, conscious of what shortcomings may exist in judicial access and prepared to decide whether to seek judicial access on a case-by-case basis.

Of course, the size of my business, just like that of over 90% of persons doing business with the United States, cannot justify the cost of an attorney's services. And the viewpoint of a "client" such as myself will not be the same as that of my prospective attorney. By this, I mean no denigration of attorneys. It is just that the interest of the pencil is different than the interest of the writer. But I believe that this committee, if it intends to address the problem of judicial access, needs to hear from more "clients" like myself, rather than from attorneys. That is why I have come here today, all the way from Los Angeles. And if by testifying I can help this Committee, or if I can encourage other knowledgable "clients" to actively support the work this committee has already produced to encourage judicial access, then I will be satisfied.

ACCESS PROBLEMS

My letter of September 28, 1982, attached hereto, describes access problems that this Committee may want to address. By stimulating access to the courts in procurement-law situations, Congress may recover enough "windfall profits", for the benefit of the United States, to make the operation of the entire judicial-access program self-supporting. A saving of 1% of the current $160 billion-plus from 18 million procurement programs would generate a "fund" of $1.6 billion each fiscal year.

AUTOMATIC "NO-FAULT" AWARDS

But regardless of the profitability of wider judicial access in procurement situations, I believe it makes no economic sense for Congress to require findings of fault before awarding litigation expenses to parties who have prevailed over United States agencies.

A simple analysis proves my point. Let us ignore the fact that agencies currently are refusing to pay awards even after they have been decided. Instead, let us assume that proper awards will occur in 4% of the cases, and assume further that the average award is $18,000, just as the Congressional Budget Office predicted. Therefore, if Congress can save just 4 percent of $18,000 in the cases not eligible for award, it would be cost-effective to award automatically to prevailing parties.

Four percent of $18,000 is only $720. By making the award automatic, there will be a saving in litigation expense not only for both parties, but also in the Court's time as well. Neither side will need to lay a foundation, nor conduct discovery, in the case in chief, to properly support or deny a prospective award. An aggregate saving of only $720 per case should therefore be easily obtained.

Moreover, the award litigation, also fully compensible upon prevailing, that must occur only after one party has "prevailed" (See White v. N.H. Dept. of Employment Security, ___ U S ___, 102 S Ct 1162 (1982)), will be eliminated entirely if the award is automatic. The saving, I estimate on personal experience, will amount to some $40,000 per award litigation, aggregating the expenses of both parties and the Court. That in itself is equivalent to $1,600 saved (4% of $40,000) when spread over all cases, and greatly exceeds the $720 per-case saving required to justify conversion to automatic awards.

NON-PAYMENT OF JUDGMENTS

But the pressing problem for a small businessman like myself is the plain fact that even "mandatory" awards are not now likely, regardless of statutory law to the contrary. For example, in Los Angeles

attorney Stanley Fleishman recently had to resort to a contempt action to make the United States pay its litigation-expense judgment. This shocking situation will no doubt deter me from filing another procurement case, and if so I will not be obtaining for the United States any more "windfall profits". Because, regardless of whether the United States pays me, I have to pay those litigation expenses to my attorney. Those expenses typically amount to several years' income for a small businessman like myself, for each action.

It is just asking too much if Congress expects me, or anyone who would ask my advice, to confront the Administration voluntarily on those terms. Obviously, this is not a problem that legislation alone can cure. It requires a change of attitude by the Administration.

I believe that the Administration's antipathy to EAJA awards is bipartisan, but correctible. It is indeed strange. And when the "Department of Justice" sent Alice Daniel, Esq., to Congress to argue that the Court's judgment in the blatant class sex-discrimination case Copeland v. Marshall, 641 F2d 880 (1980), was unconscionable, as Raymond Calamaro, Esq. had claimed to this Committee (See Serial 96-23 @46 & 50), to her credit she elided Calamaro's Copeland comments when she reprised his statement in the House Committees. See Hearing, H.R. 5103 & 6429, House Small Business Committee (1980) @ 178, & Serial 62, 96th Congress House Judiciary @ 42.

Nevertheless, as the dissenting judges of the Copeland case noted in National Association of Concerned Veterans v. Secy of Defense, 675 F2d 1319, 1329 (1982), the "Department of Justice" has apparently decided to deliberately escalate, wherever and however possible, the cost of recovery to a prevailing plaintiff. Similar vexatious tactics have been used against me and others in the Los Angeles Courts by the "Department of Justice". And if the cost of obtaining an award is thereby going to exceed the award itself, I as a small litigant will have to decide not to litigate in the first place. Although the "Department of Justice's" message is clear to me, I see nothing Congress can do about it except to award expenses automatically.

5TH AMENDMENT

When I began my cases against the Agencies I was naive enough to believe that the 5th Amendment protected me against Agency "takings". But even now, I believe that most other citizens share that incorrect belief. For as Alexander Hamilton said in arguing against the necessity for the 5th Amendment:

"To bereave a man * * * by violence to confiscate his

> estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation * * *." Federalist, No. 84

Nevertheless, Congress and the States ratified the Fifth Amendment in 1791:

> "nor be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation." Constitution, Amendment V

The 5th Amendment seems to require the award of litigation expenses to a person prevailing over a United States agency, unlike the 1853 statutory "American Rule" that some claim has existed for two hundred years. In fact, when the Fifth Amendment was adopted, it was the regular practice to award litigation expenses in suits between private parties. See, e.g., U.S. v. 341.45 Acres, 542 F Supp 482, 483 (1982); Alyeska v. Wilderness Society, 421 U.S. 240, 247 (1975).

But of course the 5th Amendment does not apply to suits between private parties. And it would be difficult to see how Congress could enact, constitutionally and in 1853, a statute overruling the 5th Amendment.

But contracts of a Sovereign are binding only upon its conscience; they confer no right of action independent of the sovereign will. That is what the Supreme Court said in Lynch v. U.S., 292 U.S. 559, 579 (1934). Moreover, even the right to compensation after taking is a matter of interpretation on the Sovereign's part. Withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. Lynch at pp. 581 - 583. Therefore, litigation expenses after a taking by the United States, or even denial of judicial access itself, and even though constituting another taking, are compensible only to the extent that a statute authorizes recovery. And if, as happened with President Jackson and the Cherokees, and Stanley Fleishman this year, the Administration simply refuses to abide by the Court's decision, there is practically nothing Congress can do about it.

Just as Hamilton predicted it would, the 96th Congress recognized as despotic the power of the Executive to utilize litigation expense as a weapon, to oppress parties in opposition to it by economic duress. In 1980 Congress neutralized the weapon by passage of EAJA. In effect, EAJA is the "teeth" of the 5th Amendment required by the Lynch Court. The Agencies were given almost one year of warning to cease their oppression or to obtain special legislation to continue it.

But almost immediately, committees representing special interests of the Administration have attacked the Judiciary Committee's

valiant effort. By literally suspending rules to the contrary, without warning, and under a special "gag" rule, the House Ways and Means Committee rammed through Sec. 292 of H.R. 4961, thereby permitting one Administrative agency to disembowel EAJA.

If one agency is permitted such an action, in no time at all the other agencies will probably be getting the same privilege, tucked away in some obscure amendment to some appropriations bill. There are also reports that the OMB is trying to get this Committee to help dismantle EAJA. I hope you will resist that pressure, and that you will be able to counteract Agency attempts to amend the EAJA in miscellaneous bills.

As a survivor of extreme Administration pressure I say: Be valiant. You are defending the 5th Amendment, without which there is no Constitution and no protection from dictatorship. And I believe you have popular support to resist the Administration's pressure. One need only look at what happened to Rep. Ullman after he took it upon himself to try to stop EAJA. His constituents apparently decided he had acted against their interests, and they replaced him.

ARTICLE III JUSTICE

As a "client" in civil actions and administrative proceedings, I have had the opportunity to see the great difference between them. As a "client" I believe the Supreme Court correctly stated, in Northern Pipeline v. Marathon Pipeline, ____ U.S. ____, 50 LW 4892 (1982); U.S. v. Will, 449 U.S. 200 (1980); and, O'Donoghue v. U.S., 289 U.S. 516 (1933), that the judicial power of the U.S. cannot be exercised outside Article III Courts because justice is unattainable except within them. I have personally seen the pressure put on agency adjudicating officers to follow the agency position. I am deeply disturbed by it. No matter how much expertise is gained by using specialized agency boards, prohibiting direct access to Article III Courts merely presents a prohibitive wasted step, and severely constrains access to justice for persons thereby affected.

The disparity between Article III and Agency justice is clearly exemplified by the contrasting statements of Chief Judge Tannenwald September 28, 1981, in Serial 97-29, House Ways & Means Committee (1981), and Judge Bratton April 21, 1979, Serial 96-23, Senate Judiciary Committee (1979). Judge Tannenwald's partisan statement prejudicially favored the Agency litigating before him. Moreover, he favored the use of oppressive tactics by that Agency, as a means to reduce the access to justice in his "Court". On the other hand, Judge Bratton was aloof and would not

venture an opinion (just as Article III required), except to say that withholding justice by economic device was improper. A fitting illustration of Northern Pipeline in action.

Let me close by quoting Rep. Philip Crane, from Serial No. 97-29, 97th Congress House Ways & Means Committee (1981), wherein he said @ 72-73:

> "The government must come to realize that their concern over the flood gates being opened is no justification for the unlawful taking of property. * * * If administration of increased due process does prove to be a burden, other solutions need to be pursued than the neglect of * * * constitutional rights. * * * If [the Government] case is more clear cut from the outset less dispute will occur over the outcome. This in my mind is a more favorable direction and one which should be more fully pursued today and hereafter."

I would be pleased to answer any questions you may have. Again, Mr. Chairman, I want to thank you for the opportunity to present this statement.

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Agency Administration Subcommittee
Senate Committee on Judiciary
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September 28, 1982

Gentlemen:

REFERENCE: OVERSIGHT HEARINGS Oct 6, 1982: Accessibility of Judicial System

We would be pleased to receive a copy of the Hearing Report when it is issued.

The comments below are intended to be included in your Oversight Hearing.

ACCESS TO JUDICIAL SYSTEM

My wife and I have a small business that supplies electronic repair parts to the Army among others, on contracts certified under the Defense Production Act. (50 USC app 2061 et seq) Inasmuch as we were by far the most efficient and least costly supplier of one item, the Army designated us as the principal source for it even though we were not the first supplier to them, on their readiness program.

In 1979-80, one contracting office decided to buy this item from a "large" business instead of us, at over double the cost. These are expensive items, and the Army's procurements were our principal source of income. After we protested to the GAO that the Army was not following statutory and regulatory law,

the Army signed the contracts regardless and thereby mooted the protest. Letting the contracts while under protest was itself another violation.

EQUAL ACCESS TO JUSTICE ACT

In 1981 the Equal Access to Justice Act (EAJA) became operative. The Army once again intended to let a contract unfairly. This time the result was different. Because of the Act, we filed to restrain the award while the GAO made its review and reported to the District Court. Although the Agency again tried to award while under protest, the lawsuit effectively prevented it. It also forced a higher command level to check for actual need. The check showed that the procurement, once again to be awarded at an exorbitant price, was actually unnecessary because the Agency already had a 16-year supply on hand. The shelf life of stock is, of course, much less. The 1981 procurement would have increased the Agency's stock to a 24-year supply!

The aggregated waste on this item alone amounted to $973,922.00 .

After my court action stopped the procurement, all of the contracting officers in that unit and the person responsible for assigning the "urgent" priority to the procurement became separated from the Agency, according to my sources of information.

The efficacy of my access to the courts is plainly shown by this case. Without the courts, neither I nor the GAO could stop the 1980 contracts. But with the courts, we stopped the 1981 contract. By stopping it, I not only saved $398,000.00 for the Defense budget but also weeded out the deadwood.

My actions were undertaken under the "Private Attorney General" doctrine. See, e.g, G.E. v Seamans, 340 F Supp 636 (1972). Under that doctrine, I was not entitled to a contract award, even though I was the low bidder. In fact, my argument was that no award was proper, because the statutes were violated and the parts were not needed.

My legal expenses amounted to more than my normally-modest income for one whole year. Thus, I would never have been able to stop this unlawful procurement if the EAJA had not promised me my litigation expenses if I was successful. However, I wasn't compensated at all, because the "Department of Justice" objected to any award whatsoever. I am continuing my effort to recover my costs, but so far the litigation expense to recover them has exceeded their original amount.

After the procurement was stopped, I learned that the Number One Priority at the "Justice" Department is to wreck the Equal Access to Justice Act. I have monitored all of the reported cases in the Courts and several Agencies, and I believe the DOJ is achieving its goal. They are making EAJA into a travesty.

NO-FAULT AWARDS

I believe Sen. Domenici's idea that EAJA awards should be "no-fault" was brilliant. I wish it had been enacted into law. It is now obvious that

it is the only reliable method to encourage small litigants like myself to speak up when they become convinced that the US is perpetrating an injustice. It also saves the cost of litigating the fee issue for both parties and frees the awarding body from deciding another independent issue.

The stigma associated with antagonizing the US effectively prevents people from asserting their grievance against the US. But stigma aside, I certainly didn't have the financial strength to take on the US in court. I filed my action only because I became convinced that the US would reimburse my litigation expenses incurred as a "Private Attorney General" to enforce the law. My court action being on behalf of and creating a windfall for the US, it seems unfair that the "common fund" thus created will not be tapped to pay for its creation.

STANDING TO SUE

Another problem is illustrated by this case: If I had not taken on the US, no one else could have stopped the unlawful award, even if it were openly admitted by the Agency that it was unlawful to award. The US would be poorer and the deadwood would still be awarding unlawful contracts.

I believe standing to sue should be codified and enlarged to include "prospective" as well as "actual" victims of bureaucratic depredations. The interested parties have the requisite expertise to know when the bureaucracy errs, but they may be maneuvered out of standing now. To correct for that defect, the "zone of interest" doctrines of Control Data v Baldridge, 655 F2d 283 (1981) & Rhode Island Com. on Energy v GSA, 561 F2d 397 (1977), deserve to be rewritten by Congress to permit informed, expert intervention to help keep the bureaucracy on course and to avoid sudden panics.

SOVEREIGNTY PROBLEM

Another access problem concerns the resort to sovereignty by bureaucrats where it doesn't belong. In ordinary marketplace activities the US is enjoined from using sovereignty to decide its actions. See Perry v US, 294 US 330, 352 (1935). The strong movement within Congress is to place the Federal Government and private litigants on a completely equal footing. See Natural Resources Defense Council v EPA, 484 F2d 1331 (1973). Nevertheless, contracts are still written and administered as though by sovereign right.

Recently, the Supreme Court decided in Northern Pipeline v Marathon Pipe Line, 50 USLW 4892 (1982), that disputes between "private" litigants may not be decided outside Article III courts. Yet, when the US contracts as a "private party" with another, the US insists that disputes shall be held de novo outside Article III courts and in forums controlled by Executive patronage.

I believe as a matter of personal experience that judicial access is effectively denied if de novo review is restricted to agencies other than Article III courts. Litigants must always be free to apply to the Article III court as a matter of right and should not be restricted to agency review

by the application of sovereignty in cases where the US is not acting in its sovereign capacity. In light of Article III and Northern Pipeline, I am simply not convinced that limiting de novo review of Federal questions to forums not having Article III status is not a denial of an important Constitutional right which has now been forbidden by the Supreme Court.

I believe the EAJA may be one of the most important laws passed by the 96th Congress. I am now involved in litigation applying it to cases in such various forums as the Courts of the United States, the ASBCA, the Tax Court, and the GAO. I intend to help define what I believe is superior legislation and in a rational manner. At present it is too soon to analyze the results of my various efforts. I hope this letter will stimulate further oversight.

Very truly yours,

J. H. McQuiston

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December 15, 1982

Gentlemen:

REFERENCE: OVERSIGHT HEARINGS, Dec 9, 1982: Accessibility of Judicial System

At the beginning of Reference, Sen. Grassley asked for comments on three specific questions: (1) Is EAJA being implemented; (2) Is EAJA effective; and (3) If not, why not. Permit me to comment on responses elicited at the Hearing.

IMPLEMENTATION

Department of Justice (DOJ) referred this Subcommittee to its Policy Statement "Award of Attorney Fees * * * EAJA", and to its "Digest * * * EAJA" as representative of how DOJ is implementing EAJA. DOJ also expressed "the Administration's support for the purpose of the Act".

These DOJ documents clearly exhort DOJ attorneys to resist awards by every conceivable means. Nowhere in them is there any instruction regarding when to support an award. Yet, the purpose of the Act (supported by DOJ) is to encourage awards, not to search for loopholes to oppose awards, after the US has not prevailed in the action or proceeding. If DOJ's policy is truly "neutral" or

"supportive" of EAJA, it ought to present a more even-handed approach toward deciding when to support or oppose awards. The Subcommittee may want to ask DOJ to explain the apparent imbalance.

Just as Mr McGrath has admitted, the DOJ Policy Statement has been partly discredited by opinions delivered by Article III Courts. In response to my later inquiry, a spokesman said DOJ has no plans to update the Policy to conform to current conditions. This Subcommittee may want to ask DOJ why not.

The Policy Statement is seriously deficient by not providing guidance when the agency realizes it will lose the litigation and elects to concede before judgment. DOJ insists the US would not then be liable for an award, notwithstanding Congress' expressed intent to follow contrary cases such as Foster v Boorstin, 561 F2d 340 (1977) and Cuneo v Rumsfeld, 553 F2d 1360 (1977), and notwithstanding established judicial procedures for awarding fees in such cases.

> "Surely the effectiveness of this incentive for persons of limited means would be greatly diminished if the complainant were forced to bear the expense of his attorneys' fees whenever the Agency chose to award the requested relief after a court action had been filed but prior to a judgment or a court order." Foster, @ 342.

> "If the government could avoid liability for fees merely by conceding the cases before final judgment, the impact of the fee provision would be greatly reduced. The government would be free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking. Thus, a general bar to awards of fees resolved before the final judgment cannot be accepted by the court." Foster, @ 343 quoting Cuneo.

Morrison v Ayoob, 627 F2d 669 (1980), cert den 449 US 1102 (1981), proposed a simple test for "causation" especially applicable to sovereign acts, saying:

> "To require some stricter standard of causation would mean that the defendant could hide his true motivation behind what seems a plausible alternate justification." Morrison, @ 671.

The Subcommittee may want to ask DOJ why the Policy Statement doesn't provide guidance about applying the Morrison rule to EAJA.

The Policy Statement gives no instruction about how to decide whether an amount of expense is "reasonable". Mere size alone is no criterion; yet the Policy exhorts DOJ attorneys to resist awards by insisting upon detailed time sheets, etc, in the apparent belief that somehow these documents will decide whether or not the quality of representation was "reasonable".

The Policy also overlooks the fact that time spent recovering the fee is also compensible. See Perkins v Standard Oil, 399 US 222 (1970). And, by not stressing the importance of economy in litigation, the Policy Statement itself may be a substantial factor in creating "excessive" awards. This Subcommittee may want to question DOJ further about these deficiencies and misdirections, that are of great practical concern to the US and to the prevailing "client", but that are of little interest to clients' attorneys.

These comments regarding the DOJ Policy Statement are not meant to identify all of its more troubling parts.

EFFECTIVENESS

The clear intent of Congress was to bring the US to at least the same standard applied to other parties in actions or proceedings. Thereby, the sovereignty defenses were surrendered. See Sec 202, P.L. 96-481. The case law thus applicable to the US is rich in detail, and well-known to DOJ because much of it was developed by DOJ or other agencies. But in its Policy Statement, DOJ devoted a substantial part to the assertion of sovereignty defenses.

While I support DOJ's conclusion that now is too soon to gauge EAJA's effectiveness, DOJ's vexatious and trivial arguments against awards certainly reduce the Act's effectiveness, because it is only natural for adjudicators to believe the Government's argument. Nevertheless, a Congressional response is not necessarily indicated.

A much more pressing problem would be the repeal of "disemboweling" amendments of EAJA by Congress, such as Sec 292 of P.L. 97-248.

Mr McGrath's outrage over awarding compensation for work performed before October, 1981, is of course something that time will render moot. As clearly shown in the legislative history, and as restated in Nunes-Correia v Haig, 543 F Supp 812, 815 (1982), Congress intended the opposite position than DOJ's, and the Courts are responding by deciding against DOJ on this issue in every case where the prevailing plaintiff is represented by able counsel.

But the McGrath example only questions how effective is DOJ's interpretation of EAJA's basic goal, if DOJ would have saddled the "clients" of the GLAD attorney with the massive bill caused by Agency refusal to obey the law of the land. Although it was an action by private citizens, the GLAD case gained an important victory for people everywhere, by asserting deaf peoples' statutory rights to "listen" to government-sponsored television just like Congress intended. If DOJ itself had not been remiss in enforcing the law, then there would have been no need for the private enforcement action. By making the award, the Court was merely vindicating Congress, showing also that EAJA can be effective despite DOJ.

But, the main problem still remains: Without an automatic award to the prevailing party, everything still depends upon the skill of the "client's" attorney, a factor probably unknown and untested by the "client". The attorney has to win two cases before the "client" wins. If the attorney loses the second case, the "client" will lose but the attorney will be compensated nevertheless. Such a situation presents a minimal incentive to the attorney and a decided handicap to the "client". Therefore, it is no wonder that there are few EAJA applications presently. It is particularly acute in agency proceedings, where the chances of award are slimmer than in Article III Courts. The Data presented to this Committee validates that conclusion.

To exemplify typical fees actually incurred by a "client", I submit herewith one statement from a reputable attorney, for work performed in editing an EAJA brief, in the amount of $4,867.45 . The bill did not cover expenses incurred

for research, drafting, reproduction, or filing costs for the brief. The attorney performed no original research, nor was the draft substantially reworked by the editing process. Nevertheless, editing was necessary.

This bill represents only a small portion of a typical litigation expense, inasmuch as several briefs, not to mention oral argument, would normally be required to present the case to the Court. Obviously, such litigation is a substantial gamble for any small business or individual.

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December 1, 1982

McQuiston Associates
1035 N. Orange Drive
Los Angeles, California 90038

Attention: Mr. Jim McQuiston

FOR PROFESSIONAL SERVICES RENDERED: November, 1982

Army

Prepare checklist of items to accomplish on appeal and confirm brief procedures with 9th Circuit Court of Appeals, 11/1; conference with Mr. McQuiston, review 9th Circuit Rules with regard to brief format, begin review of brief draft, 11/12; review and revise brief draft, request copies of House Judiciary Committee report, Serial 62, 11/15; meet with Mr. McQuiston, continue revisions of brief, 11/16; continue review and modifications to brief, 11/17, 11/18, 11/19; telephone conference with Mr. McQuiston, 11/18; conference with Mr. McQuiston, 11/19; file designation of record, 11/22; letter to Mr. McQuiston, 11/29

Lynn B. Larsen:	11.5 hrs. at $110/hr	
Richard L. Hutchinson:	44.0 hrs. at $ 75/hr	
Sherman Wong:	3.5 hrs. at $ 75/hr	$ 4,827.50

DISBURSEMENTS

Reproduction Costs	$ 23.20	
Messenger	16.75	
	$ 39.95	39.95
	Sub-total. . .	$ 4,867.45

MODIFICATIONS

1. DOJ's statement regarding uncertainty about agency review capability is not correct. Congress clearly prohibited agency review, to protect the finding from agency tampering. The House was concerned about agency influence (See

96 H.J. 62, & Hearings H.R. 5103 & 6429, House S.B.). Senators Domenici and DeConcini both expressed concern because the Senate's bill was deficient with respect to agency meddling after the decision was reported. The House Judiciary amendment insulated the decision from Agency review. Only an automatic award would have been safer than the present language. Also, the House amendment enabled two-agency adjudications to be covered by the Act (although DOJ denies it: See 46 FR 32906).

I see no need to amend or clarify EAJA on this point. However, I support Sen. Domenici's original idea as better, i.e. to make automatic, "no-fault" awards to prevailing parties in agency proceedings. A corollary would be to remove the bad-faith penalty from the award proceedings. The penalty, being such, should be administered in an action against the agency by the Attorney General and not in an action brought by a private party. It is really of no interest to the prevailing party where the payment originates. He should not have to bear the burden of determining what is really only a concern of the government's.

2. DOJ's statement regarding the definition of eligibility as being at variance within EAJA is erroneous (ABA's testimony is also erroneous on this point). The two definitions now in EAJA are identical equivalents.

DOJ and ABA failed to notice that the definition in 2412 is "negative or" and in 504 is "negative and". To a logician, a "negative or" statement is equivalent to a "negative and" statement (One of the DeMorgan theorems). Symbolically, $\sim A . v . \sim B \equiv \sim (A \cdot B)$. Thus, 2412(d)(2)(B)'s statement of (not i), (not ii), or (not iii), is the same as 504(b)(1)(B)'s statement of "not" (i) [encompassing i & ii of 2412] and (ii) [encompassing iii of 2412].

Therefore, Congress was consistent in the EAJA definitions, as supplied by SBA. Neither section should be amended as DOJ requested.

3. Time of "final judgment" is indeed a contentious issue with DOJ. Note, however, that in 504 there should be no argument about the language, because the phrase "final disposition in the adversary adjudication" must be construed as meaning the time when no further appeal may be taken.

But DOJ's contention, that "final judgment" is the time when a court enters an appealable order, would make bad law.

Firstly, other statutes define "final judgment" differently than the DOJ proposal. They say it is the time when no further appeal may be taken. For example:

> "26 USC 7481: (a) * * * (T)he decision * * * shall become final-- (1) Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time, or
>
> * * *
>
> "(b) Nonreviewable Decisions. The decision * * * shall become final upon the expiration of 90 days after the decision is entered."

"28 USC 1963: A judgment in an action * * * which has become final by appeal or expiration of time for appeal * * * ".

Thus, if not already covered by 28 USC 1963, uniformity demands that EAJA decisions per Title 28 should be governed by finality when the time for further appeal has expired. However, instead of adding the definition to 2412, it would be more appropriate and promote uniformity if a general clause was added to 28 USC 451, and probably also to 5 USC 551 (the "definitions" sections for actions and proceedings).

Secondly, defining a decision as "final" before appeals have been completed or time-barred would present the Agency with an opportunity to practice "appeal blackmail". Some periods for appeals run for 120 days, and most are at least 60 days when the US is involved. If, then, the fee application must be filed before the appeal period ends, an agency might decide to appeal simply because the prevailing party filed a fee application. Such a potential threat might scare a plaintiff into forfeiting its legitimate fee award, and that would be patently unfair.

Thirdly, determination of litigation expenses cannot begin until one party "prevails". See White v New Hampshire Dept of Employment Security, ___ US ___, 102 S Ct 1162 (1982). Obviously, the prevailing party is not identifiable until all appeals have been taken or time-barred. Inasmuch as EAJA awards are only made to "prevailing" parties, limitations must run from the time when no further action may be taken by any party in the case in chief.

Such a logical conclusion will doubtless be reached unassisted and by the Courts. An EAJA amendment to that effect should not be necessary.

4. DOJ's concern about interim awards is mistaken. Proper interim awards will occur only rarely, because courts are quick to cite Hanrahan v Hampton, 446 US 754 (1980) and to deny interim attorney-fee awards unless based upon a substantial right obtained after suitable litigation. DOJ Policy is apparently to oppose vigorously such awards. Thus, if a court does make an interim award, it must have been convinced there was substantial authorization for the award.

If DOJ objects strongly to a specific interim award, or if a final decision reverses an interim award, the US may simply file a suit for refund. But to stop all interim payments per se would be contemptuous of courts' capabilities, and would be improper. Congress should not be a party to such an abuse.

5. DOJ's plan to benefit from unconstitutional acts of agencies, merely by spreading the responsibility therefor, does not appear to promote the purpose of an Act promising Equal Access to Justice. DOJ apparently offers the impression thereby that agencies sometimes deliberately and intentionally perform unconstitutional acts, and that when they do they should escape the penalty therefor or else EAJA would be inconsistent. Surely EAJA condones no unconstitutional act. Furthermore, if presently agencies are looking for a

loophole to injure any person without compensation, on account of unconstitutional agency acts, then surely Congress will want to close and not widen the loophole.

6. DOJ's definition of "grossly excessive awards" may depend upon who will pay the fee. It seems inconsistent to claim that a fee is "greatly excessive" if payable by US, but "reasonable" if paid by the prevailing party.

However, both parties share a common concern about the cost of litigating. The problem is that neither party has control over its own lawyer, let alone the opposing lawyer. However, the losing party does have some degree of control which may be exercised by simply cutting its losses early. If that party is the US, cooperation will minimize its eventual assessment.

But in this regard, the cases most eligible for awards will be the close questions, for their outcome is most uncertain and the expenses will be the largest. Close questions are also the most suitable for litigation to completion, because the law needs to be settled. They require the best lawyers as well. Yet these close questions are always the ones DOJ claims are ineligible for award because they are "substantially justified". That attitude places a heavy burden on anyone who would agree to litigate close questions, and ABA Code DR2-106 calls for better compensation as a result. If the US avoids all payment, then it will saddle the prevailing party with a large bill as the dubious compensation for helping the US to settle important questions of law.

But even with automatic awards, the court will adjust expenses for reasonableness, usually per DR2-106. The only real question for Congress to decide is whether a lawyer should be entitled to bill his "client" for the residuum that the court found "unreasonable".

If Congress decides to limit awards, it should require that such limitation should extend to all awards, public and private, for by Sec 202 Congress decided that both should be treated equally. However, controlling commerce in attorney fees would be a major step for Congress to take.

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Lastly, ABA's comments re "Courts of the United States" and its desire to include therein agencies other than Article III Courts is not helpful to the purity of the statutory language. Title 28 is now reserved by Section 451 to Article III courts (excluding the aberrant Bankruptcy Code and the Claims Court). Title 5 regulates all other agencies. Thus, Section 504 should be applied to the non-Article III courts and boards, and is applicable if (1) there is no de novo review permitted, and (2) the US is represented by counsel.

Therefore, this Subcommittee may want to examine closely the relationship each agency bears to Title 5, before revising EAJA.

m J. H. McQuiston

Senator GRASLEY. I want to thank you all for your participation and remind you that the record will be open for a few days, if anyone else wishes to submit further information.

Thank you all very much, and the meeting is adjourned.

[Whereupon, at 12:13 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL SUBMISSION FOR THE RECORD

NATIONAL LEGAL
AID & DEFENDER
ASSOCIATION

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(202) 452-0620

December 3, 1982

The Honorable Charles E. Grassley
Subcommittee on Agency Administration
Committee on the Judiciary
4-B Russell Senate Office Building
Washington, D.C. 20510

RE: Oversight Hearings On The Equal Access To Justice Act

Dear Senator Grassley:

I am pleased to respond to your request for a statement of the National Legal Aid and Defender Association's views regarding the effectiveness of the Equal Access to Justice Act and potential modifications which might be made to it. I request that this letter be included in the hearing record.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit organization devoted to the support and development of quality legal services for the poor. Its membership consists of over 2700 organizations nationwide that provide representation to indigents in civil or criminal matters. NLADA's interest in the Equal Access to Justice Act is based on the important role that it and other fee-shifting statutes play in providing access to the judicial system for the many Americans who cannot afford legal fees. These statutes have become even more important as public funds for the provision of legal assistance to the poor have become increasingly scarce.

The Equal Access to Justice Act has been in effect for just over a year, since October 1, 1981. Although many issues which have been raised in litigation have not yet been finally resolved, there is sufficient experience with the Act to identify developing trends and draw preliminary conclusions about its effectiveness. In our view, the Act is accomplishing what it was intended to; it is providing compensation to individuals of modest means who prevail in litigation against an unreasonable federal bureaucracy.* As a result, we believe that no amendments should be considered to the Act at this time, particularly those which would limit the its scope.

*Because a party must prevail in order to qualify for fees this Act raises none of the problems of the recent Sierra Club case where fees were awarded to a non-prevailing party.

Our position that it would be inappropriate to cut back on the Act is based in significant part on the fact that there have been far fewer awards than had been originally predicted. Figures are available for the first nine months of the Act's implementation in a document entitled, "Report By The Director Of The Administrative Office Of The United States Courts On Requests For Fees And Expenses Under The Equal Access To Justice Act Of 1980, October 1, 1981 Through June 30, 1982 (Septeber 22, 1982)." During the time period of the report, only eleven petitions for fees were granted out of a total of thirty decided for a total award of $683,518.

The amount of fees awarded contrasts sharply with the Congressional Budget Office's prediction that fee awards during the first year of the Act's application would total $69 million. H.R. Rep. No 96-1418, 96th Congress; 2nd session, 21 (1980). If adjusted for a nine month period the C.B.O. estimate would amount to $51.75 million. The actual expenditure was 1.3% of that amount.

While the amount of money awarded will surely increase, awards will likely be at a far lower lever than the C.B.O. estimates of $115 million in FY 1983 and $126 million in FY 1984. We expect, based on the experience thus far, that annual awards will run under $10 million. Because the costs of the Act promise to be so much less than forecast there is no viable economic argument to cut back on the scope of its coverage.

We are aware, however, that several proposals to limit the Act have been made and we would like to take this opportunity to address them. The first proposal is to remove all social security cases from the Act's coverage. The issue of the coverage of social security cases arose when the Act was initially considered. A compromise was carefully crafted whereby fees were made available in civil actions but not in administrative hearings as long as they remained "non-adversary." See, H.R. Rep. No. 96-1418, 96th Congress 2nd Session 12 (1980); 126 Cong. Rec. H10220 (daily ed. October 1, 1980).

There is no reason to reopen this decision. There have been only a handful of awards in cases brought under this Social Security Act; there have been at least an equal number of decisions denying fees. To the best of our knowledge, all awards have beem appealed and none have actually been paid. This hardly supports the claim that such an amendment is necessary to protect the fiscal integrity of the Social Security system.

More important, such an amendment would be fundamentally unjust. As Representative Claude Pepper and several of his colleagues wrote to the House Judiciary Committee on September 19, 1980:

> The Select Committee on Aging has extensive documentation of the problems of the elderly, disabled and their dependents in adjudicating Social Security Claims. These claimants are the archetype of those victimized by a careless bureaucracy, the very people this legislation is intended to assist.
>
> * * * * * * * * *
>
> It cannot be emphasized too strongly that Social Security benefits are not the gift of a magnanimous government. They are instead a legal entitlement based on the claimant's contribution to the system. It is unconscionable to deny this one class of potential victims of unjustified government action the same access to justice provided. . .for everyone else.

Another set of amendments to the Act was included in the House-passed Omnibus Budget Reconciliation Act of 1981 but was subsequently dropped at the conference. It is similar to proposals included in S. 1223 which is pending before the Senate Judiciary Committee. In pertinent part these proposals would: only allow fees to prevailing parties who suffer a pecuniary loss in excess of $500 in their individual capacities and not as representatives of an organization or group; exempt from this requirement prevailing parties engaged in carrying on a trade or business for profit; require that fees awarded not be disproportionate to the amount-in-controversy; and limit fees to the amount of a legally enforceable obligation which the party would be required to pay in the absence of an award under the Act.

The proposed amendments constitute an effort to deny any benefit under the Act to non-business interests, effectively refuting the notion that all citizens have equal rights before the law. The selective imposition of the $500 pecuniary loss requirement stands as the clearest example. The "pecuniary loss" requirement also raises concern for other reasons.

First, many claims against the federal government involve millions of dollars but are spread out over thousands of people. By requiring that each individual have a $500 loss and forbidding the aggregation of claims, this amendment would foreclose an award of fees in successful challenges to many patently illegal agency actions.

Second, many claims against the federal government simply are incapable of economic valuation. Prime examples are procedural claims against federal bureaucracies. Others are First Amendment cases. Under this proposal, if a non-commercial party could not put a price tag on its claim, or if it sought only injunctive or declaratory rather than monetary relief, it would be denied fees regardless of the merit or importance of the claim raised.

Third, this language, which requires that the loss be in an individual rather than representative capacity, will likely completely eliminate organizational plaintiffs from coverage. This would be an extremely unfortunate result because organizations, as recognized in the law of standing, are often the most appropriate parties to bring a case.

Finally, "pecuniary loss" has no established legal meaning and will have to be defined by the courts. It recalls the federal question amount-in-controversy requirement which Congress abolished only two years ago. As was the experience with the amount-in-controversy, we can expect a complex and totally unnecessary body of law to arise on the question of what "pecuniary loss" means and how to value it. Parties will be encouraged to inflate claims and develop novel legal theories, wasting the time and resources of the courts and the agencies.

The second substantive amendment would require that fees "not be disproportionate to the amount in controversy." Initially, this language puts us squarely back in the confusion created by "amount-in-controversy." Further, there is the additional problem of the meaning of disproportionate. If an agency pulls out all stops to defend a totally illegal practice, a paintiff may be forced into very substantial legal fees before finally prevailing. Should this plaintiff be denied fees because the underlying claim may be no more than the fees? The requirement in the Act which limits fees to the situation where the agency position was not "substantially justified" is more than adequate to protect the legitimate interests of the government. If an injured person is forced to go to court to vindicate his or her rights which were unjustly denied, that person should be eligible to receive fees.

The final proposal would prohibit the award of fees except to the extent that the party would otherwise have an enforceable obligation to pay fees. This would completely eliminate the payment of fees to counsel representing clients with no resources and where their only possibility of payment is through the Act. In these circumstances there is no enforceable fee obligation for the reason that these plaintiffs cannot afford to pay. While there are limited means to provide representation to the poor, they constitute an ever-shrinking resource desperately

trying to meet an increasing demand. To the extent that this resource is diverted to asserting a citizen's rights against a governmental party found not to be "substantially justified," we submit that it is proper, just, and necessary that there be compensation under the Equal Access to Justice Act.

In the event that the Committee does choose to go forward with amendments there are several problems which have arisen in litigation under the Act which should be addressed.

First, federal attorneys are arguing that the "substantially justified" standard applies to the government's litigation posture rather than its underlying policy position. One court, Alspach v. District Director of Internal Revenue, C.A. No. J-81-1018 (D. Md., Nov. 27, 1981) rather surprisingly accepted this distinction while at least two others have rejected it. Photo Data, Inc. v. Sawyer, C.A. No. 81-2435 (D.C.D.C., Feb. 22, 1982); Costantino v. United States of America, C.A. No. 81-1571 (E.D. Pa., Dec. 2, 1981). This argument, based on a highly selective reading of the legislative history, would fundamentally alter the purpose of the Act. Rather than penalizing unreasonable government action, the Act under this interpretation would reward clever litigation tactics at the expense of the already beleaguered private citizen. Alspach must not be allowed to become the governing precedent.

A second problem is a question of statutory construction which has been troublesome for litigants. It is the precise meaning of the "final judgment" within thirty days after which the petition for fees must be filed. "Final judgment" is an elusive concept at best. Specific questions which have arisen include whether a judgment is final when issued or docketed and whether a judgment is final before motions under the post-judgment rules have been disposed of. We suggest that the best way to resolve this problem is to clarify that a judgment is final only when the time to appeal has expired. Parties could file their petitions earlier but the outside time limit would be thirty days after the expiration of the right to appeal.

In sum, the Equal Access to Justice Act is accomplishing its stated purpose although in a more modest fashion than had been anticipated. We believe both that it is premature to amend the Act and that the amendments which have been proposed are inappropriate. Congress should revisit the entire issue in early 1984 in order to prepare for a reauthorization of the Act by October 1, 1984 when it is scheduled to expire.

We appreciate your consideration of our views and will be happy to respond to any questions you may have.

Sincerely,

Ellen Josephson Vargyas

Ellen Josephson Vargyas

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